

International Media Law Reference Database



Forward

By Monroe Price

Director

Center for Global Communications Studies, Annenberg School for Communication

This “International Media Law Reference Database” is a compilation of useful media law articles, conventions and cases that offers a broad introduction to the subject. The intention behind compiling these reference materials is hardly to create an encyclopedia. Nor is it to serve as an authoritative source for media law. This guide seeks to offer a foundation and serve as a resource for professionals and students of law, communications and journalism who are interested in the subject, as well as for individuals engaged in activities such as moot court competitions.

Media law as a discipline is, in many ways, a recent creation—certainly a creation of the second half of the twentieth century. It arose, initially, from concerns over freedom of expression in the aftermath of World War II, and this growth coincided with further advancements in technology as media industries (at the time, radio and television) expanded. The rapid changes in technology of recent years, including the convergence of media platforms and the growth of social media, have challenged some of the core assumptions of the discipline. In order to appreciate the current scholarly debate, one must first understand the development and transformation of the discipline over the last half century.

Media law is inherently inter-disciplinary: it is informed by communication scholars, legal scholars, as well as sociologists and political scientists. Media law touches on issues central to a society: democratic values, national identity, and the encouragement of creativity. It encompasses such diverse issues as reputation; privacy; the rights of parties, candidates and individuals during elections; the well-being of children; the encouragement of violence in society; and, in a sense, the development of speech and expression. Media law governs journalistic behavior and influences journalistic practice in both positive and negative ways. And although media law is implemented on a domestic level, it is subject to international norms—the prized right to receive and impart information regardless of frontiers.


Lawyers, media practitioners, and civil society groups as well as governments and the communications industry struggle over the rights and responsibilities of the media and of those who produce and receive information. It is our hope that this reference guide will assist you as you familiarize yourself with the issues, and further develop and expand your knowledge in media law.

About the Author

The Center for Global Communication Studies (CGCS) at the Annenberg School for Communication, University of Pennsylvania, is a leader in international education and training in comparative media law and policy. It provides students, academics, lawyers, regulators, civil society representatives and others the opportunity to evaluate and discuss comparative, global and international communications issues. Working with the Annenberg School, the University of Pennsylvania, and research centers, scholars and practitioners from around the world, CGCS provides research opportunities for graduate students; organizes conferences and trainings; and provides consulting and advisory assistance to academic centers, governments, and NGOs. CGCS draws on various disciplines, including law, political science, and international relations, among others. The center's research and policy work addresses issues of media regulation, media and democracy, measuring and evaluation of media development programs, public service broadcasting, and the media's role in conflict and post-conflict environments.

How to Use this Guide

The guide is organized into five sections. The first four sections 1) Theories of Free Speech; 2) Freedom of Expression & Privacy; 3) Technology & Speech; and 4) Judicial Decisions on Free Speech have incorporated the full text of the articles into this guide. The fifth section- International Conventions- does not include the full text of the conventions within this guide, but links to the online text have been included in the Table of Contents (pages vi- vii) to allow users to freely access these important international treaties, covenants and conventions online.

This guide is not intended to be read from the beginning to end, but rather as a reference for researching various interests pertaining to media law. Users can locate articles of interest by clicking the Bookmarks icon . This icon can be found on the left-side of the screen on the navigation panel or by clicking View - > Navigation Panels-> Bookmarks. After clicking the Bookmark icon, a Table of Contents will appear in the Navigation Panel and users can easily click their article of interest. We invite you to explore the “International Media Law Reference Database,” and expand your knowledge and interests in media law.

The Center for Global Communication Studies
Annenberg School for Communication
202 S. 36th Street
Philadelphia, PA 19104-3806

Phone: (215) 898-9727

Fax: (215) 573-2609

E-mail: cgcs@asc.upenn.edu

Join the [CGCS Newsletter mailing list](#).

Join the [CGCS Events mailing list](#).

TABLE OF CONTENTS

THEORIES OF FREE SPEECH

The primary aim of the articles in this section is to understand the different rationales for protecting freedom of speech, and explore whether any of the rationales can sufficiently explain society's interest in protecting speech. Each rationale varies in terms of the extent of speech protection and permissible restrictions, which in turn have an important bearing on issues such as whether different kinds of speech deserve and receive the same level of protection; whether freedom of speech is protected in the same manner for everyone in society; and what are the effects of incidental restrictions on speech.

Alexander Meikejohn (1961), "The First Amendment is An Absolute," *The Supreme Court Review*, pp. 245-266.

Melville B. Nimmer (1975), "Introduction-Is Freedom of the Press A Redundancy: What Does it Add To Freedom of Speech?," *The Hastings Law Journal*, 26, pp. 639-658.

Lee C. Bollinger Jr. (1976), "Freedom of the Press and Public Access: Toward A Theory of Partial Regulation of the Mass Media," *Michigan Law Review*, 75.1, pp. 1-42.

T.M. Scanlon, Jr. (1978-9), "Freedom of Expression and Categories of Expression," *University of Pittsburgh Law Review*, 40, pp. 519-550.

Frederick Schauer (1983), "Must Speech Be Special?," *Northwestern University Law Review*, 78, pp. 1284-1306.

Larry Alexander (1989), "Low Value Speech," *Northwestern University Law Review*, 83.3, pp. 547-554.

Cass R. Sunstein (1989), "Low Value Speech Revisited," *Northwestern University Law Review*, 83.3, pp. 555-561.

Frederick Schauer (1992), "Uncoupling Free Speech," *Columbia Law Review*, 92, pp. 1321-1357.

Sevanti Ninan (1997), "History of Indian Broadcasting Reform," *Cardozo Journal of International and Comparative Law*, 5, pp. 341-364.

William Magnuson (2010), "The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection Under International Law," *Vanderbilt Journal of Transnational Law*, 43, pp. 255-312.

FREEDOM OF EXPRESSION & PRIVACY

Finding an appropriate balance between freedom of speech and the right to privacy presents a considerable challenge in almost all jurisdictions, especially in the context of mass media. In addition, there is significant disagreement in the academic literature with regards to the rights which seek to protect freedom of expression and privacy. Some argue that privacy should be explicitly and separately protected, while others believe that it is better protected through other, more fundamental rights. The articles in this section seek to capture the debate on these issues and analyze the judicial treatment of this balancing act.

Louis D. Brandeis and Samuel D. Warren (1890), "The Right to Privacy," *Harvard Law Review*, 4, pp. 193-220.

James Rachels (1975), "Why Privacy is Important," *Philosophy & Public Affairs*, 4.4, pp. 323-333.

Helen Nissenbaum (1998), "Protecting Privacy in an Information Age: The Problem of Privacy in Public," *Law and Philosophy*, 17. 5/6, pp. 559-596.

Parul Gewirtz (2001), "Privacy and Speech," *The Supreme Court Review*, pp. 139-199.

Alison L. Young (2003), "Case Comment: Remedial and Substantive Horizontality: the Common Law and *Douglas v. Hello! Ltd.*," *Public Law* 232.

TECHNOLOGY & SPEECH

This set of articles addresses various regulatory and free speech concerns arising out of technological advancements in mass media. With technological advancement, questions of access, in terms of the increased ability to create, transmit and receive content, become even more critical. These articles reflect on these topics, including the manner in which legislatures, governments and courts reevaluate their regulatory responses in the context of a rapidly changing technology environment. While evolving media technologies undoubtedly bring into focus aspects of free speech theory that previously did not receive significant attention, they also present significant democratic challenges. The articles in this section explore ways in which the law has attempted to safeguard democratic interests that may be threatened or challenged by technological developments.

Stephen Carter (1984), "Technology, Democracy, and the Manipulation of Consent," *The Yale Law Journal*, 93, pp. 581-607.

Monroe E. Price (2001), "The Newnewss of New Technology," *Cardozo Law Review*, 22, pp.1885-1913.

Itsuko Yamaguchi (2002), "Beyond De Facto Freedom: Digital Transformation of Free Speech Theory in Japan," *Stanford Journal of International Law*, 38, pp. 109-122.

Jack M. Balkin (2004), "Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society," *New York University Law Review*, 79, pp. 1-58.

JUDICIAL DECISIONS ON FREE SPEECH

CANADA

Crookes v. Newton, Argued May 25, 2009-Decided September 15, 2009, available at http://www.cippic.ca/uploads/Crookes-Appellant_Factum.pdf.

UNITED KINGDOM

Campbell v. MGN Ltd, House of Lords, 6 May 2004, available at <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd040506/campbe-1.htm>.

UNITED STATES

Connally v. General Construction Company, No. 314. Argued November 30, December 1, 1925-Decided January 4, 1926.

Chaplinsky v. New Hampshire, No. 255. Argued February 5, 1942-Decided March 9, 1942.

New York Times v. Sullivan, No. 39. Argued January 6, 1964 -Decided March 9, 1964.

New York Times v. United States (the Pentagon Papers Case) No. 1873. Argued June 26, 1971-Decided June 30, 1971.

Miller v. California, No. 70-73. Argued January 18-19, 1972-Reargued November 7, 1972-Decided June 21, 1973.

Ward v. Rock Against Racism, No. 88-226. Argued February 27, 1989-Decided June 22, 1989.

Virginia v. Black, No. 01-1107. Argued December 11, 2002-Decided April 7, 2003.

EUROPEAN COURT OF HUMAN RIGHTS

Sunday Times v. UK (No. 2) (*Application no. 13166/87*). *Council of Europe, European Court of Human Rights*, 26 November 1991, available at <http://www.worldlii.org/eu/cases/ECHR/1991/50.html>.

Case of Observer and Guardian v. The United Kingdom: Judgment, *Council of Europe, European Court of Human Rights*, 26 November 1991, available at

<http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/cases/regionalcases/europeancourtofhumanrights/nr/681>

Goodwin v. The United Kingdom (Application no. 17488/90), *Council of Europe, European Court of Human Rights*, 27 March 1996, available at <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/cases/regionalcases/europeancourtofhumanrights/nr/506>

Von Hannover v. Germany (Application no. 59320/00): Judgment, *Council of Europe, European Court of Human Rights*, 24 September 2004, available at <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/cases/regionalcases/europeancourtofhumanrights/nr/701>.

INTER-AMERICAN COURT OF HUMAN RIGHTS

Claude-Reyes et al. v. Chile, *Inter-American Court of Human Rights*, 19 September 2006, available at http://www.oas.org/DIL/access_to_information_human_right_Case_of_Claude_Reyes_et_al_vs_Chile.pdf.

INTERNATIONAL CONVENTIONS

The following international treaties, covenants and conventions outline the human and universal rights and freedoms (including rights to receive and impart information) that ought to be equally applied to all peoples. Such conventions largely shape the behavior and actions of sovereign states both domestically and in the international arena, and the truths upheld in these documents are frequently referred to by courts, lawyers and media professionals.

Charter of the United Nations and Statute of the International Court of Justice, San Francisco, 1945, available at <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf>.

Universal Declaration of Human Rights, *United Nations General Assembly*, 10 December 1948, available at http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

International Covenant on Civil and Political Rights (ICCPR), *General Assembly resolution 2200A (XXI)*, 16 December 1966, available at <http://www2.ohchr.org/english/law/ccpr.htm>.

International Covenant on Economic, Social and Cultural Rights (ICESCR), *General Assembly resolution 2200A (XXI)*, 16 December 1966, available at <http://www2.ohchr.org/english/law/cescr.htm>.

Convention for the Protection of Human Rights and Fundamental Freedoms, *Council of Europe, European Court of Human Rights*, 1950, available at <http://conventions.coe.int/treaty/en/treaties/html/005.htm>.

International Convention on the Elimination of All Forms of Racial Discrimination, *General Assembly resolution 2106 (XX)*, 21 December 1965, available at <http://www2.ohchr.org/english/law/cerd.htm>.

American Convention on Human Rights, *Inter-American Specialized Conference on Human Rights*, 22 November 1969, available at <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm>.

African (Banjul) Charter on Human and Peoples' Rights, *Assembly of Heads of State and Government*, 27 June 1981, available at http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%200 charter.pdf.

Universal Islamic Declaration of Human Rights, *Islamic Conference*, available at <http://www.alhewar.com/ISLAMDECL.html>.

The Cairo Declaration on Human Rights in Islam, *The Organization of the Islamic Conference*, 5 August 1990, available at <http://www.alhewar.com/ISLAMDECL.html>.

ALEXANDER MEIKLEJOHN

THE FIRST AMENDMENT IS AN ABSOLUTE

Forty-two years ago the *Schenck* opinion,¹ written by Mr. Justice Holmes for a unanimous Court, opened a judicial controversy that still rages. It has taken many forms. In recent years it has divided the Supreme Court Justices into two groups which seem unable to understand each other well enough to formulate with clarity the issue about which they differ. Their discussion of that issue, which is indicated by the title of this paper, has been unclear because the contending parties have not been able to agree on the sense in which the word "absolute" shall be used.

The first portions of this paper will seek a needed clarification of the issue in controversy. For that purpose it will use Mr. Justice Black's recent James Madison Lecture, *The Bill of Rights*² and that section of Mr. Justice Harlan's *Konigsberg*³ opinion which discusses theoretically the meaning of the First Amendment. Relevant opinions of Justices Holmes and Frankfurter will also be taken into account. I shall then attempt an expression of my own thesis.⁴

Alexander Meiklejohn, former President of Amherst College, is Professor Emeritus of Philosophy, University of Wisconsin.

¹ *Schenck v. United States*, 249 U.S. 47 (1919).

² 35 N.Y.U.L. REV. 882 (1960).

³ *Konigsberg v. State Bar*, 366 U.S. 36, 49-56 (1961).

⁴ For several reasons, much of this paper is written in the first person.

First, in his *Konigsberg* dissent, 366 U.S. at 56, Mr. Justice Black, taking the

I. MR. JUSTICE BLACK'S POSITION

Mr. Justice Black's absolutist thesis is stated by his lecture in one sentence: "I take no law abridging to mean *no law abridging*."⁵ With that general statement in mind, he examined and interpreted, one by one, the ten provisions of the Bill of Rights. And, on historical and philosophical grounds, he found them all to be "absolutes" in the sense that "they mean what they say." It should be noted, however, that this assertion does not imply that in all respects they say fully and clearly what they mean. The Framers of the Constitution suffered from the same semantic difficulties as do its present-day interpreters. The following quotations illustrate the point at issue.

Concerning the Eighth Amendment, Mr. Justice Black said:⁶

The Eighth Amendment forbids "excessive bail," "excessive fines," or the infliction of "cruel or unusual punishments."

absolutist position, speaks of "some people" of the same school whose view of the First Amendment differs from his own. And, in an appended note, he mentions me as one of them. *Id.* at 65 n. 19, referring to: Meiklejohn, *What Does the First Amendment Mean?* 20 U. CHI. L. REV. 461 (1953). In the words which follow, I must, therefore, speak not for absolutism in all its forms, but only for my own version of it.

Second, my book *Free Speech and Its Relation to Self-Government* (1948) has a closing chapter entitled "Reflections" that begins: "No argument about principles is, I suppose, ever finished. But the argument of these lectures seems to the writer of them, peculiarly incomplete. They constitute, it seems to me, not an inquiry, but only the beginning of an inquiry. Even if it be agreed that the 'clear and present danger' formula denies rather than expresses the meaning of the Constitution, even if we are convinced that the guarantee of the freedom of public discussion which is provided by the First Amendment admits of no exceptions, we are, because of those very conclusions, plunged at once into a multitude of bewildering questions. Those questions relate both to theory and to practice. And this book makes no pretense of having specifically dealt with them." *Id.* at 92. That frankly acknowledged incompleteness has often been called to my attention and I need, in reply, to say about it whatever a non-lawyer can say.

Third, the writing of this paper is largely due to the friendly insistence of Professor Harry Kalven, Jr., of the Law School of the University of Chicago. He and I have had, in recent years, a continuing exchange of ideas. Professor Kalven tells me that he is not sure that my interpretation of the First Amendment can stand the test of lawyer-like application to the many specific situations which the courts must handle. In response to that challenge, I cannot presume to offer fully specific answers to specific problems. I can only suggest principles, bringing them as near as I can to the actual issues with which the courts deal.

⁵ Black, *supra* note 2.

⁶ *Id.* at 871-72.

This is one of the less precise provisions. The courts are required to determine the meaning of such general terms as "excessive" and "unusual." But surely that does not mean that admittedly "excessive bail," "excessive fines," or "cruel punishments" could be justified on the ground of "competing" public interest in carrying out some generally granted power like that given Congress to regulate commerce.

And part of his discussion of the Fourth Amendment was as follows:⁷

The use of the word "unreasonable" in this Amendment means, of course, that not *all* searches and seizures are prohibited. Only those which are *unreasonable* are unlawful. There may be much difference of opinion about whether a particular search or seizure is unreasonable and therefore forbidden by this Amendment. But if it *is* unreasonable, it is absolutely prohibited.

About the Fifth Amendment he said:⁸ "There has been much controversy about the meaning of 'due process of law.' Whatever its meaning, however, there can be no doubt that it must be granted." And, finally, as he declared the First Amendment to be absolute, Mr. Justice Black supported his assertion by singling out only one phrase of that very complicated statement: "The phrase 'Congress shall make no law' is composed of plain words, easily understood."⁹

With regard to the ambiguity of other phrases of the Amendment, he was not explicit, as he was in dealing with the Eighth and Fourth and Fifth Amendments. But it may, I think, be taken for granted that the words "abridging the freedom of speech, of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of their grievances" are not "plain words, easily understood." Together with such expressions as "excessive fines" or "cruel or unusual punishments" or "due process of law," they have been subject to "much controversy." We have inherited them from ages of bitter conflict over civil liberties. "The courts are required to determine [their] meaning."¹⁰

⁷ *Id.* at 873.

⁸ *Ibid.*

⁹ *Id.* at 874.

¹⁰ *Id.* at 871. I am not sure that Mr. Justice Black will accept this reading of what he means.

That constitutional effect of a combination of absolutist language with terms of partial ambiguity, Mr. Justice Black summed up in this statement:¹¹

To my way of thinking, at least, the history and language of the Constitution and the Bill of Rights, which I have discussed with you, make it plain that one of the primary purposes of the Constitution with its amendments was to withdraw from the Government *all* power to act in certain areas—*whatever the scope of those areas may be.*

It is clear, I think, that Mr. Justice Black, as an absolutist, is here saying, and is saying only, that the provisions of the Bill of Rights are “universal” statements. In affirmative form they say “all are”; when negative, they say: “none are.” And such statements are “not open to exceptions.” As universals, they refer, validly or invalidly, clearly or unclearly, to every member of the class which their terms designate. If you believe that “all are,” it is nonsense to say that “some are not.” If you believe that “none are,” you thereby believe, whether you know it or not, that “some are” is false. The “absolute” assertion, like every other intelligible assertion “means what it says” or, at least, what it tries to say.

II. MR. JUSTICE HARLAN’S REJECTION OF THE BLACK POSITION

As one reads the opinions of the “non-absolutists,” “balancers,” or “operationalists” who undertake to refute the thesis that Mr. Justice Black advocated in his lecture, one is amazed at the extent to which they substitute caricature for refutation. A striking example of this intellectual irrelevance may be found in the opening words of Mr. Justice Harlan’s discussion of the constitutional issue in his *Konigsberg* opinion:¹²

At the outset we reject the view that freedom of speech and association . . . , as protected by the First and Fourteenth Amendments are “absolutes,” not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment. Throughout its history this Court has consistently rec-

¹¹ *Id.* at 874-75. (Emphasis added.)

¹² 366 U.S. at 49-50.

ognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. . . .

That statement not only flatly rejected the absolutist theory but also gave two different accounts of what that theory is. The first of these two accounts might be accepted by any absolutist as a clear and accurate statement of his belief about the First Amendment. But, in sharp contrast, the second was a caricature which, for forty-two years since Mr. Justice Holmes, in *Schenck*, initiated and then discarded it, has confused and defeated the intention of the Court to confer reasonably about what the First Amendment means to say.

As he drew the caricature which made possible an easy victory over his opponent, Mr. Justice Harlan claimed the support of Mr. Justice Holmes, who had said of the provisions of the Constitution:¹³ "Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." He might also have quoted from Mr. Justice Frankfurter's concurring opinion in *Dennis v. United States*,¹⁴ where the same accusation of historical illiteracy was made:¹⁵ "The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them." But Mr. Justice Harlan's own misunderstanding of his opponent goes further than that of his predecessors. His words misconstrue not only the methods of absolutist thinking but also the conclusion at which such thinking arrives. To the accusation that his opponent relies "solely" on a dictionary, he now adds the charge that he interprets the First Amendment as establishing "an unlimited license to talk."

The absolutist interpretation, when it is thus misstated, is, of course, easily destroyed. The supposed belief in "an unlimited license to talk" is casually refuted by a footnote observation that it "cannot be reconciled with the law relating to libel, slander, mis-

¹³ *Gompers v. United States*, 233 U.S. 604, 610 (1914), quoted at 366 U.S. at 50 n. 10.

¹⁴ 341 U.S. 494, 517 (1951).

¹⁵ *Id.* at 523.

representation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like. . . ."¹⁶ But who, among Mr. Justice Harlan's colleagues, believes in "an unlimited license to talk"? Who interprets the words of the First Amendment without "considering their origin or the line of their growth"? Who reads the text as "barren words found in a dictionary" rather than as "symbols of historic experience"?

The records of judicial debate, including Mr. Justice Black's lecture, show these allegations to be mere irrelevancies. Mr. Justice Harlan could not have made them if he had kept in mind what Mr. Justice Holmes wrote in the *Frohwerk* case in 1919:¹⁷ "The First Amendment . . . obviously was not intended to give immunity for every possible use of language. . . . We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder . . . would be an unconstitutional interference with free speech." In these words, Mr. Justice Holmes effectively told us that the notion of "an unlimited license to talk" is not worthy of serious consideration. No "competent" person accepts it.

This section cannot, however, be closed without noting that other "balancers" have similarly caricatured the absolutist contention. This is especially true of Mr. Justice Frankfurter in his *Dennis* opinion, where he referred to my book on free speech.¹⁸ He there described an "absolute" as "a sonorous formula which is in fact only a euphemistic disguise for an unresolved conflict."¹⁹ He also represented it as claiming to be "self-defining and self-enforcing."²⁰ And he further characterized absolute statements as "dogmas too inflexible for the non-Euclidean problems to be solved."²¹

In relation to these inaccurate characterizations, Mr. Justice Black has said that his "absolutes" are not "self-defining"; they make use of terms whose meanings must be "determined by the courts."²² Nor are they "self-enforcing." No general principle,

¹⁶ 366 U.S. at 49 n. 10.

¹⁷ *Frohwerk v. United States*, 249 U.S. 204, 206 (1919).

¹⁸ 341 U.S. at 524 n. 5.

²⁰ *Id.* at 523.

¹⁹ *Id.* at 519.

²¹ *Id.* at 525.

²² See text *supra*, at note 10.

whether absolute or not, is enforced except as it is found to "fit the facts." The generalizing and particularizing elements in any intellectual activity must always join forces if they are to be effective. To think without facts is as ineffectual as to think without principles. Again, the absolute provisions are not "inflexible." Mr. Justice Black knows, as well as do his antagonists, that the Constitution did not exist two centuries ago. It provides for its own amendment and, through the courts, for its reinterpretation. How long it will last and how it may be changed no one knows. And, finally, absolute statements are not in themselves "dogmas." They may be either true or false, certain or uncertain, wise or foolish. For example, an assertion that "Congress has unlimited authority to abridge political freedom" is absolute in exactly the same sense as is the assertion that "Congress has no authority to abridge political freedom." Their only relevant difference is that one of these propositions is supported by the Constitution, while the other is repudiated by it.

III. MR. JUSTICE HARLAN'S POSITION

Having refuted an assertion which Mr. Justice Black did not make, Mr. Justice Harlan might next be reasonably expected to attempt to refute the assertion which his opponent did make. But at that point the *Konigsberg* opinion branches off in another direction. It offered a new and more theoretical version of the "balancing" doctrine:²³

On the one hand certain forms of speech, or speech in certain contexts, has [*sic*] been considered outside the scope of constitutional protection. . . . On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.

These words have interest for this inquiry because in his restatement of the "balancing" doctrine, Mr. Justice Harlan used "contrast" terms which, by implication, suggest the positive meaning of

²³ 366 U.S. at 50-51.

the First Amendment. "Regulatory" suggests, by contrast, "prohibitory"; "not intended to control the content of thought" suggests "intended to control the content of thought"; "incidentally" suggests "by deliberate intention." Here are the elements which, properly fused, might tell us what the First Amendment forbids. But more immediately relevant to the present discussion is the fact that Mr. Justice Harlan here turned from the consideration of "the abridgment of the freedom of speech" to a study of the "regulation of speech." And he did so without determining the relation between "regulation" and "abridgment of freedom." Are these two terms identical? I think not. Nor are freedoms and regulation antithetical. For example, a man may be denied the privilege of speaking at a meeting because someone else "has the floor." But the freedom of discussion is not thereby abridged. Members of Congress are guaranteed freedom "on the floor of either House." But their speaking is regulated under "rules of order." A citizen has authority to "petition" Congress or the Supreme Court. But the time, place, circumstances, and manner of the presentation are determined, not by his own choice, but by carefully prescribed regulations. In 1953 I wrote:²⁴ "Speech, as a form of human action, is subject to regulation in exactly the same sense as is walking, or lighting a fire, or shooting a gun. To interpret the First Amendment as forbidding such regulation is to so misconceive its meaning as to reduce it to nonsense." In the intervening years I have found no reason to change that assertion.

The freedom that the First Amendment protects is not, then, an absence of regulation. It is the presence of self-government. Our argument now proceeds to define, as clearly as it can, the intention of the Constitutional provision that begins with the words: "Congress shall make no law abridging. . . ."

IV. "RATIONAL PRINCIPLES TO MARK THE LIMITS OF CONSTITUTIONAL PROTECTION"

In his *Free Speech in the United States*²⁵ Professor Chafee stated the dilemma which confronts our inquiry and which divides

²⁴ Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 84th Cong., 2d Sess., at p. 17 (1955).

²⁵ 15 (1941).

the Supreme Court so evenly: "The question whether such perplexing cases are within the First Amendment or not cannot be solved by the multiplication of obvious examples, but only by the development of a rational principle to mark the limits of constitutional protection." Professor Chafee was too much involved in the complexities of balancing to formulate the needed principle of which absolutists speak. But he indicated the goal toward which every interpreter of the First Amendment should now be trying to make his way.²⁶ We are looking for a principle which is not in conflict with any other provision of the Constitution, a principle which, as it now stands, is "absolute" in the sense of being "not open to exceptions," but a principle which also is subject to interpretation, to change, or to abolition, as the necessities of a precarious world may require.

Apart from the First Amendment itself, the passages of the Constitution which most directly clarify its meaning are the Preamble, the Tenth Amendment, and Section 2 of Article I. All four provisions must be considered in their historical setting, not only in relation to one another but, even more important, in relation to the intention and structure of the Constitution as a whole. Out of such consideration the following principles seem to emerge:

1. All constitutional authority to govern the people of the United States belongs to the people themselves, acting as members of a corporate body politic. They are, it is true, "the governed." But

²⁶ That Chafee was, in 1942, a "balancer" is shown by the first chapter of his book to which I already have made reference. There he said in summation: "That is, in technical language, there are individual interests and social interests, which must be balanced against each other, if they conflict, in order to determine which interest shall be sacrificed under the circumstances and which shall be protected and become the foundation of a legal right." *Id.* at 32. On the other hand, his absolutist demand for a "rational principle" was never fully abandoned, though never fully satisfied. It reappears in tentative form in a personal letter to Ernest Angell: "Penning a longhand letter from a hospital bed in 1953, he [Chafee] wrote: 'In court cases fine lines have to be drawn—it's unavoidable once you get that far. Yet Meiklejohn is right in a way—things ought never to have got to this pass where freedom of thought and expression depend on distinctions as thin as a hair.' And: 'The upshot of all this is that I see little prospect of a recovery of freedom and sanity through any particular court decision. There will have to be a real repudiation of the whole darned business—but by whom? Or else, which seems more probable, it will die out because people are sick of it, the way censorship expired in 1695 in England.'" Angell, *Zechariah Chafee, Jr.—Individual Freedoms*, 70 HARV. L. REV. 1341, 1343 (1957).

they are also "the governors." Political freedom is not the absence of government. It is self-government.

2. By means of the Constitution, the people establish subordinate agencies, such as the legislature, the executive, the judiciary, and delegate to each of them such specific and limited powers as are deemed necessary for the doing of its assigned governing. These agencies have no other powers.

3. The people do not delegate all their sovereign powers. The Tenth Amendment speaks of powers that are reserved "to the people," as well as of powers "reserved to the States."

4. Article I, § 2, speaks of a reserved power which the people have decided to exercise by their own direct activity: "The House of Representatives shall be composed of members chosen every second year by the people of the several States. . . ." Here is established the voting power through which the people, as an electorate, actively participate in governing both themselves, as subjects of the laws, and their agencies, as the makers, administrators, and interpreters of the laws. In today's government, the scope of direct electoral action is wider than the provisions made when Article I, § 2, was adopted, but the constitutional principle or intention is the same.

5. The revolutionary intent of the First Amendment is, then, to deny to all subordinate agencies authority to abridge the freedom of the electoral power of the people.

For the understanding of these principles it is essential to keep clear the crucial difference between "the rights" of the governed and "the powers" of the governors. And at this point, the title "Bill of Rights" is lamentably inaccurate as a designation of the first ten amendments. They are not a "Bill of Rights" but a "Bill of Powers and Rights." The Second through the Ninth Amendments limit the powers of the subordinate agencies in order that due regard shall be paid to the private "rights of the governed." The First and Tenth Amendments protect the governing "powers" of the people from abridgment by the agencies which are established as their servants. In the field of our "rights," each one of us can claim "due process of law." In the field of our governing "powers," the notion of "due process" is irrelevant.

V. THE FREEDOM OF THOUGHT AND COMMUNICATION
BY WHICH WE GOVERN

The preceding section may be summed up thus: The First Amendment does not protect a "freedom to speak." It protects the freedom of those activities of thought and communication by which we "govern." It is concerned, not with a private right, but with a public power, a governmental responsibility.

In the specific language of the Constitution, the governing activities of the people appear only in terms of casting a ballot. But in the deeper meaning of the Constitution, voting is merely the external expression of a wide and diverse number of activities by means of which citizens attempt to meet the responsibilities of making judgments, which that freedom to govern lays upon them. That freedom implies and requires what we call "the dignity of the individual." Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.

The responsibilities mentioned are of three kinds. We, the people who govern, must try to understand the issues which, incident by incident, face the nation. We must pass judgment upon the decisions which our agents make upon those issues. And, further, we must share in devising methods by which those decisions can be made wise and effective or, if need be, supplanted by others which promise greater wisdom and effectiveness. Now it is these activities, in all their diversity, whose freedom fills up "the scope of the First Amendment." These are the activities to whose freedom it gives its unqualified protection. And it must be recognized that the literal text of the Amendment falls far short of expressing the intent and the scope of that protection. I have previously tried to express that inadequacy:²⁷

We must also note that, though the intention of the Amendment is sharp and resolute, the sentence which expresses that intention is awkward and ill-constructed. Evidently, it was hard to write and is, therefore, hard to interpret. Within its meaning are summed up centuries of social passion

²⁷ Meiklejohn, *supra* note 4, at 463.

and intellectual controversy, in this country and in others. As one reads it, one feels that its writers could not agree, either within themselves or with each other, upon a single formula which would define for them the paradoxical relation between free men and their legislative agents. Apparently, all that they could make their words do was to link together five separate demands which had been sharpened by ages of conflict and were being popularly urged in the name of the "Freedom of the People." And yet, those demands were, and were felt to be, varied forms of a single demand. They were attempts to express, each in its own way, the revolutionary idea which, in the slowly advancing fight for freedom, has given to the American experiment in self-government its dominating significance for the modern world.

What I have said is that the First Amendment, as seen in its constitutional setting, forbids Congress to abridge the freedom of a citizen's speech, press, peaceable assembly, or petition, whenever those activities are utilized for the governing of the nation. In these respects, the Constitution gives to all "the people" the same protection of freedom which, in Article I, § 6(1), it provides for their legislative agents: "and for any speech or debate in either House, they shall not be questioned in any other place." Just as our agents must be free in their use of their delegated powers, so the people must be free in the exercise of their reserved powers.

What other activities, then, in addition to speech, press, assembly, and petition, must be included within the scope of the First Amendment? First of all, the freedom to "vote," the official expression of a self-governing man's judgment on issues of public policy, must be absolutely protected. None of his subordinate agencies may bring pressure upon him to drive his balloting this way or that. None of them may require him to tell how he has voted; none may inquire by compulsory process into his political beliefs or associations. In that area, the citizen has constitutional authority and his agents have not.

Second, there are many forms of thought and expression within the range of human communications from which the voter derives the knowledge, intelligence, sensitivity to human values: the capacity for sane and objective judgment which, so far as possible, a ballot should express. These, too, must suffer no abridgment of their freedom. I list four of them below.

1. Education, in all its phases, is the attempt to so inform and cultivate the mind and will of a citizen that he shall have the wisdom, the independence, and, therefore, the dignity of a governing citizen. Freedom of education is, thus, as we all recognize, a basic postulate in the planning of a free society.

2. The achievements of philosophy and the sciences in creating knowledge and understanding of men and their world must be made available, without abridgment, to every citizen.

3. Literature and the arts must be protected by the First Amendment. They lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created.

4. Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power.

VI. A PARADOX

Out of the argument thus far stated, two apparently contradictory statements emerge. Congress may, in ways carefully limited, "regulate" the activities by which the citizens govern the nation. But no regulation may abridge the freedom of those governing activities. I am sure that the two statements are not contradictory. But their combination is, to say the least, paradoxical. It is that paradox that I must now face as I try to respond to Professor Kalven's challenge.²⁸ As a non-lawyer, I shall not discuss in detail the difficulties and puzzlements with which the courts must deal. I can only suggest that, here and there, seeming contradictions are not real.

First. A distinction must be drawn between belief and communication in their relations to Congressional authority. A citizen may be told when and where and in what manner he may or may not speak, write, assemble, and so on. On the other hand, he may not be told what he shall or shall not believe. In that realm each citizen is sovereign. He exercises powers that the body politic reserves for

²⁸ See *supra* note 4.

its own members. In 1953, testifying before the Senate Committee on Constitutional Rights, I said:²⁹

... our First Amendment freedom forbids that any citizen be required, under threat of penalty, to take an oath, or make an affirmation, as to beliefs which he holds or rejects. Every citizen, it is true, may be required and should be required, to pledge loyalty, and to practice loyalty, to the nation. He must agree to support the Constitution. But he may never be required to *believe* in the Constitution. His loyalty may never be tested on grounds of adherence to, or rejection of, any *belief*. Loyalty does not imply conformity of opinion. Every citizen of the United States has Constitutional authority to approve or to condemn any laws enacted by the Legislature, any actions taken by the Executive, any judgments rendered by the judiciary, any principles established by the Constitution. All these enactments which, as men who are governed, we must obey, are subject to our approval or disapproval, as we govern. With respect to all of them we, who are free men, are sovereign. We are "The People." We govern the United States.

However far our practice falls short of the intention expressed by those words, they provide the standard by which our practice must be justified or condemned.

Second. We must recognize that there are many forms of communication which, since they are not being used as activities of governing, are wholly outside the scope of the First Amendment. Mr. Justice Holmes has told us about these, giving such vivid illustrations as "persuasion to murder"³⁰ and "falsely shouting fire in a theatre and causing a panic."³¹ And Mr. Justice Harlan, referring to Holmes and following his lead, gave a more extensive list:³² "libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy. . . ." Why are these communications not protected by the First Amendment? Mr. Justice Holmes suggested an explanation when he said of the First Amendment in *Schenck*:³³ "It does not

²⁹ *Supra* note 24, at p. 20.

³⁰ *Abrams v. United States*, 250 U.S. 616, 627 (1919).

³¹ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

³² 366 U.S. at 49 n. 10.

³³ 249 U.S. at 52.

even protect a man from an injunction against uttering words that may have all the effect of force."

Now it may be agreed that the uttering of words cannot be forbidden by legislation, nor punished on conviction, unless damage has been done by them to some individual or to the wider society. But that statement does not justify the imputation that all "words that may have all the effect of force" are denied the First Amendment's protection. The man who falsely shouts "Fire!" in a theatre is subject to prosecution under validly enacted legislation. But the army officer who, in command of a firing squad, shouts "Fire!" and thus ends a life, cannot be prosecuted for murder. He acts as an agent of the government. And, in fact, all governing communications are intended to have, more or less directly, "the effect of force." When a voter casts his ballot for a tax levy, he intends that someone shall be deprived of property. But his voting is not therefore outside the scope of the First Amendment. His voting must be free.

The principle here at stake can be seen in our libel laws. In cases of private defamation, one individual does damage to another by tongue or pen; the person so injured in reputation or property may sue for damages. But, in that case, the First Amendment gives no protection to the person sued. His verbal attack has no relation to the business of governing. If, however, the same verbal attack is made in order to show the unfitness of a candidate for governmental office, the act is properly regarded as a citizen's participation in government. It is, therefore, protected by the First Amendment. And the same principle holds good if a citizen attacks, by words of disapproval and condemnation, the policies of the government, or even the structure of the Constitution. These are "public" issues concerning which, under our form of government, he has authority, and is assumed to have competence, to judge. Though private libel is subject to legislative control, political or seditious libel is not.

Third. In discussions of the First Amendment too little attention has been given to the regulatory word "peaceable" in relation to "assembly." It suggests principles of limitation which apply also to speech, press, petition, and to the other forms of communication which support them. This limitation is significant in demonstrating that a citizen's governing is often both "regulated" and "free."

Peaceableness in governing may serve either one or both of two purposes. It provides protection for an assembly against external

violation of rules of public order. It also seeks to ensure that relations within the assembly shall succeed in serving the governing function which warrants its protection by the First Amendment. The first of these purposes has to do with relations between the assembly and "outsiders" who, disagreeing with its ideas and intentions, may seek to disrupt the discussion and, in various ways, to render it ineffectual. In this situation, both the local authorities which have authority to "regulate" and the police who seek to apply the regulations are held responsible by the intention of the First and Fourteenth Amendments. No ordinance may be based upon disapproval of policies to be discussed or decreed by the assembly. And the police must, to the limit of their power, defend the meeting from interruption or interference by its enemies. But basically more important are the conditions of peaceableness within an assembly itself. It is, of course, impossible that everyone should be allowed to express his point of view whenever and however he chooses. In a meeting for discussion, as contrasted with a lecture, however, no one may be "denied the floor" on the ground of disapproval of what he is saying or would say. And, if the interests of a self-governing society are to be served, vituperation which fixes attention on the defects of an opponent's character or intelligence and thereby distracts attention from the question of policy under discussion may be forbidden as a deadly enemy of peaceable assembly. Anyone who persists in it should be expelled from the meeting, and, if need be, the police should give help in getting it done.

I cannot, however, leave those words on record without noting how inadequate, to the degree of non-existence, are our public provisions for active discussions among the members of our self-governing society. As we try to create and enlarge freedom, such universal discussion is imperative. In every village, in every district of every town or city, there should be established at public expense cultural centers inviting all citizens, as they may choose, to meet together for the consideration of public policy. And conditions must be provided under which such meetings could be happily and successfully conducted. I am not thinking of such lunatic-fringe activities as those in Hyde Park in London. I am thinking of a self-governing body politic, whose freedom of individual expression should be cultivated, not merely because it serves to prevent outbursts of violence which would result from sup-

pression, but for the positive purpose of bringing every citizen into active and intelligent sharing in the government of his country.

Fourth. Largely because of our failure to make adequate provision for free and unhindered public discussion, the courts are called upon to judge the constitutionality of local ordinances which forbid or limit the holding of public meetings in public places. Such ordinances come into effect when individuals or groups assemble in such a way as to interfere with other interests of the community or of its members. The most striking and perplexing cases of this kind occur when meetings are held on the public streets or in parks whose primary use is, in the opinion of the authorities, blocked or hindered to a degree demanding action. Now if such ordinances are based upon official disapproval of the ideas to be presented at the meeting, they clearly violate the First Amendment. But if no such abridgment of freedom is expressed or implied, regulation or prohibition on other grounds may be enacted and enforced.

It must not be assumed that every governmental regulation of a public meeting is, under current conditions, destructive of political freedom. Conditions of traffic on a city street are very different from those in the relatively open spaces of a country village. Parks may be needed for rest, quiet, and release from excitement and strain. Just as an individual, seeking to advocate some public policy may not do so, without consent, by interrupting a church service, or a classroom, or a sickroom, or a session of Congress or of the Supreme Court, or by ringing a doorbell and demanding to be heard, so meetings must conform to the necessities of the community, with respect to time, place, circumstance, and manner of procedure. And, unless those considerations are dishonestly used as a cover for unconstitutional discrimination against this idea or that, there is no First Amendment complaint against the ordinances which express them. The Amendment, I repeat, does not establish an "unlimited right to talk."

It must further be noted that in "emergency" situations, when something must be said and no other time, place, circumstance, or manner of speech will serve for the saying of it, a citizen may be justified in "taking the law into his own hands." In the famous example of Mr. Justice Holmes, a man is not allowed to shout "Fire!" *falsely* in a theatre. But, if, during a performance in a theatre, a person sees a fire which threatens to spread, he is not only

allowed, he is duty-bound, to try to find some way of informing others so that a panic may not ensue with its disastrous consequences. The distinction between "falsely" and "truly" is here fundamental to an understanding of what freedom is.

Fifth. In the current discussions as to whether or not "obscenity" in literature and the arts is protected by the First Amendment, the basic principle is, I think, that literature and the arts are protected because they have a "social importance" which I have called a "governing" importance. For example, the novel is at present a powerful determinative of our views of what human beings are, how they can be influenced, in what directions they should be influenced by many forces, including, especially, their own judgments and appreciations. But the novel, like all the other creations of literature and the arts, may be produced wisely or unwisely, sensitively or coarsely, for the building up of a way of life which we treasure or for tearing it down. Shall the government establish a censorship to distinguish between "good" novels and "bad" ones? And, more specifically, shall it forbid the publication of novels which portray sexual experiences with a frankness that, to the prevailing conventions of our society, seems "obscene"?

The First Amendment seems to me to answer that question with an unequivocal "no." Here, as elsewhere, the authority of citizens to decide what they shall write and, more fundamental, what they shall read and see, has not been delegated to any of the subordinate branches of government. It is "reserved to the people," each deciding for himself to whom he will listen, whom he will read, what portrayal of the human scene he finds worthy of his attention. And at this point I feel compelled to disagree with Professor Kalven's interpretation of what I have tried to say. In his recent article on obscenity, he wrote:³⁴

The classic defense of John Stuart Mill and the modern defense of Alexander Meiklejohn do not help much when the question is why the novel, the poem, the painting, the drama, or the piece of sculpture falls within the protection of the First Amendment. Nor do the famous opinions of Hand, Holmes, and Brandeis. The emphasis is all on truth winning out in a fair fight between competing ideas. The emphasis is clearest in Meiklejohn's argument that free speech is indis-

³⁴ Kalven, *Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 15-16.

pensable to the informed citizenry required to make democratic self-government work. The people need free speech because they vote. As a result his argument distinguishes sharply between public and private speech. Not all communications are relevant to the political process. The people do not need novels or dramas or paintings or poems because they will be called upon to vote. Art and belles-lettres do not deal in such ideas—at least not good art or belles-lettres. . . .

In reply to that friendly interpretation, I must, at two points, record a friendly disavowal. I have never been able to share the Miltonian faith that in a fair fight between truth and error, truth is sure to win. And if one had that faith, it would be hard to reconcile it with the sheer stupidity of the policies of this nation—and of other nations—now driving humanity to the very edge of final destruction. In my view, “the people need free speech” because they have decided, in adopting, maintaining and interpreting their Constitution, to govern themselves rather than to be governed by others. And, in order to make that self-government a reality rather than an illusion, in order that it may become as wise and efficient as its responsibilities require, the judgment-making of the people must be self-educated in the ways of freedom. That is, I think, the positive purpose to which the negative words of the First Amendment gave a constitutional expression. Moreover, as against Professor Kalven’s interpretation, I believe, as a teacher, that the people do need novels and dramas and paintings and poems, “because they will be called upon to vote.” The primary social fact which blocks and hinders the success of our experiment in self-government is that our citizens are not educated for self-government. We are terrified by ideas, rather than challenged and stimulated by them. Our dominant mood is not the courage of people who dare to think. It is the timidity of those who fear and hate whenever conventions are questioned.

VII. CONCLUSION

Professor Leonard W. Levy, in a stimulating book,³⁵ has recently given strong evidence that the Framers of the Constitution were not, for the most part, explicitly concerned with those aspects of the First Amendment’s meaning and application which now

³⁵ *LEGACY OF SUPPRESSION* (1960).

especially concern us. If we assume that his thesis has been established, what bearing does it have upon the contentions of this paper?

In answer to that question, two different statements can be made which properly supplement each other. First, the Framers initiated a political revolution whose development is still in process throughout the world. Second, like most revolutionaries, the Framers could not foresee the specific issues which would arise as their "novel idea" exercised its domination over the governing activities of a rapidly developing nation in a rapidly and fundamentally changing world. In that sense, the Framers did not know what they were doing. And in the same sense, it is still true that, after two centuries of experience, we do not know what they were doing, or what we ourselves are now doing.

In a more abstract and more significant sense, however, both they and we have been aware that the adoption of the principle of self-government by "The People" of this nation set loose upon us and upon the world at large an idea which is still transforming men's conceptions of what they are and how they may best be governed. Wherever it goes, that idea is demanding—and slowly securing—a recognition that, with respect to human dignity, women have the same status as men, that people of all races and colors and creeds must be treated as equals, that the poor are at least the equals of the rich. In popular language the idea finds expression in such phrases as "the land of the free," or "government by consent of the governed," or "government of the people, by the people, for the people shall not perish from the earth."

In our discussions of the Constitution, we commonly think that the clearest and most compelling expression of the "idea" of political freedom is given by the First Amendment. But in theory, and perhaps in practice, more penetrating insights are given by the Preamble's declaration that "We, the people of the United States . . . do ordain and establish this Constitution . . .," or by the Tenth Amendment's assertion that, while we have delegated some limited governing powers to our agents, we have reserved other powers to ourselves, or, finally, by the provision of Article I, Section 2, that we have authority to exercise direct governing power in electing our representatives.

If what we are saying here is true, then *Robertson v. Baldwin*

seems to me to contain the most disastrous judicial pronouncement that I have found:³⁶ "The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors. . . ." In 1951, in his opinion in *Dennis*, Mr. Justice Frankfurter, in quoting that statement, said of it,³⁷ "That this represents the authentic view of the Bill of Rights and the spirit in which it must be construed has been recognized again and again in cases that have come here within the last fifty years."

In 1953, in a comment on that concurring opinion,³⁸ I quoted that dictum and criticized it. To sum up what I have been trying to say in this paper, I wish to repeat some part of that criticism. Mr. Justice Frankfurter, it must be noted, does not here speak as one expressing his own opinion. He is telling us of a contention which has prevailed for a long time in the Court. Is that contention valid? Is it true, for example, that the religion clause of the First Amendment was "inherited" from a nation which had, and still has, an established church? However that may be, a ringing dissent by the first Mr. Justice Harlan in *Robertson v. Baldwin* seems to me to cut into meaningless bits the assertion that no "novel principles of government" were in mind when the Bill of Rights was adopted. Arguing, in his dissent, about the constitutionality of involuntary servitude, he said:³⁹ "Nor, I submit, is any light thrown upon the question by the history of legislation in Great Britain. The powers of the British Parliament furnish no test for the powers that may be exercised by the Congress of the United States." The distinctive feature of our Constitution, he declared, that marks it off from British political institutions, is that it is established, not by the legislature, but by the people. And he summed up the novelty of our system:⁴⁰ "No such powers have been or can be exercised by any legislative body under the American system. Absolute, arbitrary

³⁶ 165 U.S. 275, 281 (1897).

³⁷ 341 U.S. at 524.

³⁸ Meiklejohn, *supra* note 4.

³⁹ 165 U.S. at 296.

⁴⁰ *Ibid.*

power exists nowhere in this free land. The authority for the exercise of power by the Congress of the United States must be found in the Constitution. Whatever it does in excess of the powers granted it, or in violation of the injunctions of the supreme law of the land, is a nullity, and may be so treated by every person." To a teacher of freedom in the United States that seems to be good law. I wish it would seem so to those who now have authority to determine what good law is.

HEINONLINE

Citation: 26 Hastings L.J. 639 1974-1975

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Mon May 2 15:05:42 2011

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0017-8322](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0017-8322)

Introduction—Is Freedom of the Press A Redundancy: What Does it Add To Freedom of Speech?

By MELVILLE B. NIMMER*

BEFORE turning to the provocative issues posed in this symposium on the First Amendment and the Media, it may be well to pause by way of introduction to consider a preliminary constitutional issue. In the voluminous discussions, judicial and otherwise, of the rights of the media, one issue appears to have been virtually ignored.¹ That the First Amendment guarantee of freedom of expression, whatever its scope, may be claimed not just for newspapers and other printed publications, but also for motion pictures,² and radio and television broadcasts³ is clear enough. Freedom of the press amounts to freedom of "the media."⁴ But the constitutional text protects against "abridging the freedom of speech, or of the press."⁵ Why this duality? Is any freedom conferred upon "the press" by the freedom of the press clause which would not be available to it (as well as to nonmedia speakers) by the freedom of speech clause? Alternatively, may it be argued that a separate press clause implies that speech via the press is subject to some restraints that would not be applicable to other speech? If each of these inquiries is to be answered in the negative, does this mean

* Professor of Law, University of California, Los Angeles.

© 1975 by Melville B. Nimmer.

1. Since this text was written, it has come to the author's attention that Mr. Justice Potter Stewart, in a recent speech at the Yale Law School, focused upon the same issue as that posed in this introduction, reaching somewhat different conclusions. The reader is fortunate in being able to consider for himself Justice Stewart's insightful views by turning to page 631 of this issue.

2. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

3. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

4. See *Gertz v. Robert Welch, Inc.*, 94 S. Ct. 2997 (1974); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948).

5. U.S. CONST. amend. I.

that "freedom of the press" is a meaningless appendage to the speech clause?

As nature abhors a vacuum, the law cannot abide a redundancy. The presumption is strong that language used in a legal instrument, be it a constitution, a statute, or a contract, has meaning, else it would not have been employed.⁶ In the real world we know that even lawyers sometimes employ unnecessary phrases.⁷ But the legal presumption against futile verbiage is itself a part of the real world, and must be taken into account. Apart from the force of the canons of construction, we are beginning to observe a tension between the rights of the press and of those who would speak although they do not command the press. It may well be, then, that the courts will ultimately reach for some independent meaning in the freedom of the press clause. It is the purpose of this introduction preliminarily to explore that issue.

History casts little light on the question here posed. The foremost historian of the First Amendment tells us that prior to and contemporaneous with its adoption "[m]ost writers, including Addison, Cato, and Alexander, who employed the term 'freedom of speech' with great frequency, used it synonymously with freedom of the press."⁸ Insofar as a few writers did distinguish the two concepts, it was based upon the now discarded theory that for purposes of defamation "speech was free so long as it was truthful, while truth was not a defense to a charge of libelous publication."⁹ Nothing in the fragmentary records of debate attending the adoption of the First Amendment suggests that the Founding Fathers had this, or, indeed, any other distinction in mind, when they chose to protect both freedom of speech and of the press against abridgment. It may be surmised that to some this duality was deemed necessary because the reference to "speech" might be construed to protect only oral expression, so that the reference to "the press" was added in order explicitly to protect written expression.

This rationale is somewhat remotely suggested by the language of Pennsylvania's first constitution, adopted in 1776. It provided: "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained."¹⁰ But only the state constitutions of Pennsylvania

6. *E.g.*, *United States v. Howell*, 78 U.S. (11 Wall.) 432, 436 (1871); *see* CAL. CIV. CODE § 3541 (West 1970); *cf.* *Cole v. Richardson*, 405 U.S. 676 (1972).

7. *See* D. MELLINKOFF, *THE LANGUAGE OF THE LAW* 349, 404 (1963).

8. L. LEVY, *LEGACY OF SUPPRESSION* 174 (1960).

9. *Id.*

10. PA. CONST. art. XII (1776) (Declaration of Rights), *quoted in* 5 *THE FEDERAL*

and Vermont at the time of the adoption of the First Amendment purported to protect freedom of speech as such, while all but four of the states at that time expressly provided constitutional protection for freedom of the press.¹¹ This fact, when combined with the prevailing rhetoric in the post-Revolutionary period recognizing freedom of speech, tends to support Professor Levy's conclusion that freedom of speech and of the press were at that time thought of as interchangeable.

But as we have seen in other constitutional contexts, the original understanding of the Founders is not necessarily controlling. It is what they said, and not necessarily what they meant, that in the last analysis may be determinative. This is particularly true when constitutional language is subjected to tensions not anticipated when the text was written. During the past term of the Supreme Court, several cases were decided which suggest that just such a tension is building between the rights of speech and of the press.

The Prison Visitation Cases

There are, for example, the prison visitation cases, *Pell v. Procunier*¹² and *Saxbe v. Washington Post Co.*,¹³ which, although not articulated as such, may be said to pose the issue of whether those who assert claims under the freedom of the press clause are entitled to greater rights than those who claim under the freedom of speech clause. In both of the cases members of the press challenged prison regulations which forbade press and other media interviews with specific individual inmates.¹⁴ In each instance the challenge was based upon the freedom of the press clause. In *Pell* there was a companion case in which the same regulations were challenged by a group of prisoners, relying upon the freedom of speech clause.

The Court first disposed of the freedom of speech issue. Proceeding upon "the hypothesis that under some circumstances the right of free speech includes a right to communicate a person's views to any willing listener, including a willing representative of the press for the purpose of publication by a willing publisher,"¹⁵ the Court nevertheless

AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3083 (F. Thorpe ed. 1909).

11. L. LEVY, *LEGACY OF SUPPRESSION* 183-85 (1960).

12. 94 S. Ct. 2800, 2827 (1974).

13. *Id.* at 2811, 2827 (1974).

14. Visitation with prisoners was limited to the inmate's family, friends, attorneys and clergy. See *id.* at 2808 n.8, 2813.

15. *Id.* at 2804.

denied the free speech claim. It found that the applicable countervailing interests, especially that of internal security within the corrections facilities, outweighed any speech interests asserted by the prisoners, particularly in view of the alternative modes of communications open to prisoners.¹⁶

The media representatives asserted a freedom of the press claim that markedly differed from the free speech position of the prisoners. They argued that freedom of the press includes a right of access to the sources of newsworthy information.¹⁷ The Court, borrowing from its opinion in the reporter privilege case, *Branzburg v. Hayes*,¹⁸ acknowledged that "'news gathering is not without its First Amendment protections' . . . for 'without some protection for seeking out the news, freedom of the press could be eviscerated.'"¹⁹ By this concession, the Court appeared to recognize a right under freedom of the press not available under freedom of speech. But the concession was quickly withdrawn by the further statement that "[t]he Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally."²⁰ Since members of the public²¹ were denied visitation rights, the Court denied such rights to the press. The proposition that the press may claim greater rights than the public generally, said the Court, "finds no support in the words of the Constitution or in any decision of this Court."²²

This is as clear a statement as has thus far emerged from any decision of the Court that those words in the Constitution which speak of "freedom of the press" do not carry any meaning beyond that contained in the reference to "freedom of speech." Yet, the Court's reasoning in the *Pell* and *Saxbe* opinions raises doubts that are not entirely set at rest by the decisions. The Court reacknowledged that "without

16. *Id.* at 2806-07. These were found to include communications by mail, and via those persons who were permitted visitation rights. See note 14 *supra*.

17. The media plaintiffs contended "that, irrespective of what First Amendment liberties may or may not be retained by prison inmates, members of the press have a constitutional right to interview any inmate who is willing to speak with them, in the absence of an individualized determination that the particular interview might create a clear and present danger to prison security or to some other substantial interest served by the corrections system." 94 S. Ct. at 2807.

18. 408 U.S. 665, 707 (1972). For a discussion of this case, see note 24 *infra*.

19. 94 S. Ct. at 2809 (citations omitted), *quoting* *Branzburg v. Hayes*, 408 U.S. 665, 681, 707 (1972).

20. 94 S. Ct. at 2810.

21. Other than a limited group previously known to the prisoner. See note 14 *supra*.

22. 94 S. Ct. at 2810.

some protection for seeking out the news, freedom of the press could be eviscerated.”²³ Can it be said, in the same sense, that without some protection for seeking out the news, freedom of speech could be eviscerated?²⁴ Even the restrictive prison regulations challenged in both *Pell* and *Saxbe* accorded greater visitation rights to the press than to members of the public. For example, the California prison regulations involved in *Pell* permit newsmen (but not general members of the public) to enter prisons to interview inmates selected at random by the corrections officials from the prison population. They also permit newsmen to sit in on group meetings in connection with prison programs, and to interview inmate participants. In the federal system, the subject of *Saxbe*, newsmen (but not members of the public) are permitted to tour the premises, to photograph prison facilities, and to interview inmates who may be encountered in such a tour. The Court made a point of noting these greater rights for the press,²⁵ but apparently found

23. *Id.* at 2809, quoting *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

24. Compare *Zemel v. Rusk*, 381 U.S. 1 (1965), with *Branzburg v. Hayes*, 408 U.S. 665 (1972). In *Zemel* the Court affirmed denial of a passport to Cuba where the claimant's stated purpose was “to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen.” 381 U.S. at 4. In denying *Zemel*'s First Amendment claim, the Court stated: “The right to speak and publish does not carry with it the unrestrained right to gather information.” *Id.* at 17. But *Zemel* did not allege a purpose to publish, only to gather information for himself. This is, then, at most, a “speech” and not a “press” claim. Only two of the Justices (Douglas and Goldberg) dissented on First Amendment grounds.

Contrast this with *Branzburg*, where the reporters asserted a right to gather information for press purposes. Although a majority of the Court denied this claim as well (insofar as it impliedly granted a privilege against disclosure of sources), four of the Justices dissented on First Amendment grounds: Mr. Justice Douglas argued, “The press has a preferred position in our constitutional scheme The function of the press is to explore and investigate events” 408 U.S. at 721-22. Mr. Justice Stewart (joined by Justices Brennan and Marshall) premised his dissent on “the critical role of an independent press in our society.” *Id.* at 725. Mr. Justice Powell joined the majority in a special concurrence which suggested that under other facts he might join with the dissenters in finding a reporter's privilege. “The asserted claim to privilege should be judged [in each case] on its facts by the striking of a proper balance between *freedom of the press* and the obligation of all citizens to give relevant testimony with respect to criminal conduct.” *Id.* at 710 (emphasis added).

Taking *Zemel* and *Branzburg* together, it is arguable that a majority of the Justices would find no “speech” right to seek out information, but that, at least in some circumstances, there is a “press” right to seek out news. The quoted passage from *Zemel*, particularly with the gloss cast by *Branzburg*, suggests by “necessary implication” that the right to “speak and publish” [provided both functions are involved] does carry with it a “restrained” right to gather information. *Id.* at 728 n.4 (Stewart, J., dissenting) (emphasis added). But see also a “speech” right to obtain information upheld in *Lamont v. Postmaster General*, 381 U.S. 301 (1965) and *Procunier v. Martinez*, 94 S. Ct. 1800 (1974). Cf. *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

25. 94 S. Ct. at 2813-14.

them of no constitutional significance.

One may wonder, however, had the prison regulations in fact granted no greater rights to the press than to members of the public, whether the Court would as easily have concluded that freedom of the press confers no rights beyond those of freedom of speech. The question is particularly pertinent since even where the press enjoyed greater de facto rights than the general public, as in *Pell* and *Saxbe*, only five justices were prepared to deny the press still greater constitutional rights and to concur in the stated equating of press and speech rights. In a case involving the reporting of news where press and public are in fact equally restricted, it is not difficult to envisage at least one member of the *Pell-Saxbe* majority shifting sides so as to produce a constitutionally cognizable freedom of the press that goes beyond freedom of speech.²⁶

The Right of Access Cases

Pell and *Saxbe* were cases in which both freedom of the press and freedom of speech were invoked in support of the same objective. What of a case where the freedoms of press and speech may be said to be in conflict? What is to prevail?

The day after the decisions in *Pell* and *Saxbe* the Supreme Court handed down a decision which may be viewed as just such a case. In *Miami Herald Publishing Co. v. Tornillo*²⁷ the validity of a Florida right of reply statute was put in issue. The *Miami Herald* argued that the statute, by requiring a newspaper to grant political candidates a right to equal space in order to answer such newspaper's criticism, violated the freedom of the press guarantee. The Florida circuit court upheld the *Herald's* position, expressly holding the statute unconstitutional under the freedom of the press clause.²⁸ On direct appeal, the Florida Supreme Court reversed, ruling that "free speech" was enhanced rather than abridged by the right of reply statute.²⁹ It may be said that both of the Florida courts were correct in their conclusions, but each ignored the competing right involved. The circuit court properly concluded

26. In this regard it may not be without significance that Mr. Justice Stewart, who has evidenced a profound understanding of First Amendment theory in numerous opinions upholding speech claims, and who advocated a constitutional right of the press to seek out news in his dissent in *Branzburg* (see 408 U.S. at 728 n.4), was the author of the Court's opinions in *Pell* and *Saxbe*.

27. 94 S. Ct. 2831 (1974).

28. 38 Fla. Supp. 80 (Cir. Ct. 1972).

29. 287 So. 2d 78 (Fla. 1973).

that the operation of the right of reply statute served to limit freedom of the press, while the Florida Supreme Court was equally correct in deciding that the same statute enhanced the public's freedom of speech. The largely unarticulated but crucial issue presented to the United States Supreme Court was as to which of these rights is to prevail when they are in conflict.

Chief Justice Burger, speaking for the Court, stated that "[c]ompelling editors or publishers to publish that which 'reason' tells them should not be published' is what is at issue in this case."³⁰ With the issue thus characterized, the Court had no difficulty in concluding that the right of reply statute was violative of the freedom of the press guarantee.³¹ Nowhere does the *Tornillo* opinion explicitly acknowledge a confrontation between the rights of speech and press, but implicit recognition of the speech interest may be found in the Court's reference to the "access advocates' " argument that, given the present semi-monopolistic posture of the press, speech can be effective and therefore free only if enhanced by devices such as a right of reply statute.³² The Court in accepting the press clause argument in effect necessarily found it to be superior to any competing speech clause claims.

Still, the appellee in *Tornillo* did not assert that a right of access was required by the freedom of speech clause, but only that the Florida statute which provided such a right was not a violation of the freedom of press clause. Without such a statute it would have been necessary to invoke the speech clause as a sword against the shield of the press clause. That was precisely the nature of the claim in *Columbia Broadcasting System, Inc. v. Democratic National Committee*.³³ In that case the complainants argued that they had a First Amendment right to purchase television advertising time in order to comment on public issues

30. 94 S. Ct. at 2839.

31. Cf. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). In *Pittsburgh Press* the freedom of a newspaper to determine the content of its publication was held to be subordinate to a city ordinance which forbade sex-designated columns in help-wanted advertisements. The Court emphasized the commercial nature of the advertisements, and made the point that its decision did not "authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors." *Id.* at 391. The same might be said of material appearing in a newspaper pursuant to a right of reply statute, yet the Court in *Tornillo* concluded that freedom of the press precluded injection of material not originated or consented to by the newspaper. Is it significant that in *Pittsburgh Press* the interest competing with freedom of the press was not freedom of speech, but rather sex equality in employment practices?

32. 94 S. Ct. at 2835-37.

33. 412 U.S. 94 (1973).

without regard to whether the broadcaster had complied with the Federal Communications Commission's "fairness doctrine."

Since both the speech and press clauses of the First Amendment only protect against governmental abridgment, *i.e.*, "state action," an issue not posed in *Tornillo* was presented in *Democratic National Committee*. In *Tornillo* the right of reply statute both constituted state action with respect to the newspaper's defense under the press clause and at the same time obviated any need for the plaintiff to establish state action as a basis of claim under the speech clause.³⁴ The complainants' reliance in *Democratic National Committee* upon the speech clause as the source of a right of access apart from the commands of any statute³⁵ required a showing that the broadcaster's refusal to accord such access constituted state action. A majority of the Court in denying the public such right of access to television nevertheless assumed that the network's refusal of access constituted state action.³⁶ This decision then may be said to be predicated, like *Tornillo*, upon a determination that the rights of the media, under the press clause, outweigh the speech clause rights of those who do not control the media.

In reaching its decision, the Court in *Democratic National Committee* recognized that it was "[b]alancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed."³⁷ What was *not* acknowledged was that it was the press clause which was being weighed

34. In another case in which the right of access was denied by the Court during the past term, *Lehman v. City of Shaker Heights*, 94 S. Ct. 2714 (1974), state action was present in that the defendant city was the operator of a rapid transit system. The city was upheld in its refusal to carry in its cars advertising of a political nature. The Court noted that "a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public," but because in the present case "state action exists . . . the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious or invidious." *Id.* at 2717. The Court concluded that defendant's policies and practices could not be so characterized.

35. The complainants relied upon a construction of the Federal Communications Act in addition to an independent First Amendment right of access. 412 U.S. at 98.

36. Only Chief Justice Burger and Justices Stewart and Rehnquist found an absence of state action. *Id.* at 114-21. Of course, absent a right of reply statute it would be more difficult to find that a newspaper's activities constitute state action than to find that a broadcaster's activities may be so characterized. See *Lehman v. City of Shaker Heights*, 94 S. Ct. 2714 (1974); *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971); *Chicago Amal. Clothing Workers v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 678 (1970); cf. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1669 (1967).

37. 412 U.S. at 102.

against the speech clause. In essence, however, the Court's decision may be seen as drawing just such a balance,³⁸ and finding in favor of "the press."³⁹

The Defamation Cases

Nowhere has the Supreme Court's failure to discern or articulate a distinction between the freedoms of speech and the press been more evident than in the libel cases. In its latest venture into this field, *Gertz v. Robert Welch, Inc.*,⁴⁰ the Court both limited and extended the application of *New York Times v. Sullivan*.⁴¹ *Times* had enunciated a standard whereby defamatory statements against public officials were protected by the First Amendment provided such statements were neither knowingly false nor made with reckless disregard of their truth. That rule was subsequently extended to defamatory statements made against public figures as well as public officials.⁴² In *Rosenbloom v. Metromedia, Inc.*⁴³ a plurality opinion extended the doctrine still further by invoking First Amendment immunity for defamatory statements relating to matters "of public or general interest."⁴⁴

The majority opinion in *Gertz* retreated from the farthest reaches of *Rosenbloom* by restricting application of the *Times* doctrine to statements against public officials or figures. But while limiting the First Amendment impact upon the law of defamation in this respect, in another respect it greatly increased that impact. The Court in *Gertz* for the first time⁴⁵ formulated, as a constitutional matter, rules governing recoverable damages even for defamatory utterances against private individuals.⁴⁶ These constitute sweeping changes in the law of defama-

38. "In the delicate balancing historically followed in the regulation of broadcasting Congress and the Commission could appropriately conclude that the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many." *Id.* at 125.

39. The *Democratic National Committee* opinion does suggest that a statute might constitutionally provide for a right of access to broadcasting (*see id.* at 131), but this option may have been removed by the subsequent decision in *Tornillo*, unless broadcasting is to be distinguished from newspapers in this respect.

40. 94 S. Ct. 2997 (1974).

41. 376 U.S. 254 (1964).

42. *Greenbelt Cooperative Publ. Ass'n v. Bresler*, 398 U.S. 6 (1970); *see* *Curtis Publ. Co. v. Butts*, 388 U.S. 130 (1967).

43. 403 U.S. 29 (1971).

44. *Id.* at 43-44.

45. *But see id.* at 62 (Harlan, J., dissenting) and *id.* at 78 (Marshall, J., dissenting).

46. The rules set out by the Court may be summarized as follows: No longer may there be any recovery without fault in defamation actions; the plaintiff must at least of-

tion, and much can be said both for and against the Court's new rules. Such is not the intent of this commentary. What should be here pointed out is the ambiguity in the sweep of the *Gertz* damage rules resulting from the Court's failure to acknowledge that speech and press represent two separable interests.

Mr. Justice Powell, at the beginning of the Court's opinion in *Gertz*, spoke of the need to accommodate "the law of defamation" on the one hand, and "the freedoms of speech and press" on the other.⁴⁷ From this it might appear that no distinction was intended as between speech and press in the application of the doctrine which was to follow. Later, however, the court stated that "[t]he principal issue in this case is whether a *newspaper or broadcaster* that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements."⁴⁸ Since for constitutional purposes a broadcaster is no less a part of "the press" than is a newspaper, the above statement of "the principal issue" seems to relate exclusively to freedom of the press. Further, the opinion stated "that a rule of strict liability that compels a *publisher or broadcaster* to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship."⁴⁹

That the term "publisher" was not here used in the broad sense of anyone who causes a "publication" within the meaning of the law of defamation⁵⁰ is evident from the sentence which immediately followed: "Allowing *the media* to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties."⁵¹ Later the Court apparently spoke interchangeably of the needs of "the press"⁵² and of "the communications media."⁵³ In enunciating the new damage limitations, the Court

fer proof of negligence by the defendant. Further, the damage award must be limited to compensation for actual injury in such cases; there is to be no recovery of presumed or punitive damages, at least in the absence of a showing of knowing falsity or reckless disregard of the truth.

47. 94 S. Ct. at 3000.

48. *Id.* at 3003 (emphasis added).

49. *Id.* at 3007 (emphasis added).

50. "Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed." RESTATEMENT (FIRST) OF TORTS § 577 (1938).

51. 94 S. Ct. at 3007 (emphasis added).

52. *Id.* at 3009.

53. *Id.* at 3010.

stated: "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a *publisher or broadcaster* of defamatory falsehood injurious to a private individual,"⁵⁴ adding that it thus "shields the *press and broadcast media* from the rigors of strict liability for defamation."⁵⁵ At one point Justice Powell restated the balance referred to at the beginning of the opinion, but this time characterized it as "the balance between the needs of *the press* and the individual's claim to compensation for wrongful injury."⁵⁶

It seems fair, then, to conclude that the *Gertz* opinion formulates doctrine applicable only to defamatory statements made by newspapers and broadcasters, *i.e.*, "the media." If the Court's opinion is thus to be read literally, it leaves untouched a significant area of defamation involving written and spoken statements *not* uttered via the media.⁵⁷ Yet, one is left with the uneasy feeling that the Court's application of the new doctrine to what may be regarded as the freedom of the press arena, and its unarticulated exclusion of other "speech," may have been inadvertent, and that, further, the inadvertence was due precisely to the failure of the Court to recognize that the freedoms of speech and press are not necessarily coextensive. This failure to distinguish between the two concepts may be even more evident in Mr. Justice White's dissent in *Gertz*. He there characterized the majority opinion as applicable to

54. *Id.* (emphasis added).

55. *Id.* at 3011 (emphasis added).

56. *Id.* at 3009 (emphasis added).

57. The lower courts have generally applied the *New York Times* doctrine to non-media defamation cases. *See, e.g.*, *Scott v. McDonnell Douglas Corp.*, 37 Cal. App. 3d 277, 112 Cal. Rptr. 609 (1974) (letter charging misconduct); *McCunn v. California Teachers Ass'n*, 3 Cal. App. 3d 956, 83 Cal. Rptr. 846 (1970) (investigatory report concerning an employee); *Roemer v. Retail Credit Co.*, 3 Cal. App. 3d 368, 83 Cal. Rptr. 540 (1970) (credit reports); *Moriarty v. Lippe*, 162 Conn. 371, 294 A.2d 326 (1972) (statement of police misconduct); *Ryan v. Dionne*, 28 Conn. Supp. 35, 248 A.2d 583 (Super. Ct. 1968) (statement concerning misconduct of tax collector); *Filliben v. Jackson*, 247 A.2d 913 (Del. 1968), *cert. denied*, 394 U.S. 906 (1969) (letter charging police misconduct); *Flannery v. Allyn*, 75 Ill. App. 2d 365, 221 N.E.2d 89 (1966), *cert. denied*, 388 U.S. 912 (1967) (letter regarding police misconduct); *Sas Jaworsky v. Padfield*, 211 So. 2d 122 (La. Ct. App. 1968) (statement calling plaintiff a communist); *Rice v. Winkelman Bros. Apparel, Inc.*, 13 Mich. App. 281, 164 N.W.2d 417 (1968) (credit report); *Beatty v. Ellings*, 285 Minn. 293, 173 N.W.2d 12 (1969), *cert. denied*, 398 U.S. 904 (1970) (statement at town meeting); *Anderson v. New York Telephone Co.*, 42 App. Div. 2d 151, 345 N.Y.S.2d 740 (1973) (recorded telephone statements); *Silbowitz v. Lepper*, 32 App. Div. 2d 520 (N.Y. 1969) (letter regarding postal employee); *Fox v. Kahn*, 421 Pa. 563, 221 A.2d 181, *cert. denied*, 385 U.S. 935 (1966) (statement at public meeting). But *cf.* *Hollander v. Pan American World Airways, Inc.*, 382 F. Supp. 96 (D. Md. 1973).

"each and every defamation action,"⁵⁸ and "to all defamation actions,"⁵⁹ thus seeming to ignore the majority's repeated and apparently limiting references to defamations by newspapers and broadcasters.

The point here made is not that the majority and Justice White were necessarily in disagreement as to the scope of the majority opinion. It is rather that neither appears to have been aware that there is a contradiction between the Court's stated scope of its opinion and the description of that scope in the White dissent. The majority assumed without explanation that only "the press" was implicated in its holding, while Justice White, equally without discussion, asserted that all defamatory "speech" was involved.

Other areas of actual or potential tension between speech and press could be noted.⁶⁰ Enough has been said, perhaps, to point up the need to articulate unstated and perhaps unconscious premises as to the relationship between these two forms of expression. When such premises are made explicit it may be that the Court will decide to treat freedom of speech and freedom of the press as coextensive and as merely alternative descriptions of a unitary concept. But this need not be the conclusion to be drawn. It may be that for some purposes freedom of the press should confer greater rights than does freedom of speech, and for other purposes lesser rights.

"The Press": Defining the Physical Scope

A first step in making this determination must be a clarification as to what physical acts are referred to under the concept of freedom of the press, and how, if at all, these differ from the acts encompassed under freedom of speech. These First Amendment principles are not self-defining, so that it is open to the Court to supply definitions.⁶¹ If "speech" is held to refer to all forms of expression, it would include speech by newspapers and other segments of "the press," and freedom of the press would be a meaningless redundancy. At the other polar

58. 94 S. Ct. at 3022.

59. *Id.* at 3031.

60. It has been suggested that the issue of a reporter's privilege remains live notwithstanding the denial of the privilege in *Branzburg v. Hayes*, 408 U.S. 665 (1972). See note 24 *supra*. This raises the question of defining "those categories of newsmen who [are] qualified for the privilege." 408 U.S. at 704. This, in turn, requires a definition of "the press." See text accompanying notes 68-71 *infra*.

61. On the propriety and desirability of the Court engaging in such definitional balancing, see Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968) [hereinafter cited as *Right to Speak*].

extreme "speech" could be held to be limited to spoken, and perhaps symbolic,⁶² expression, leaving the protection of written expression to the freedom of the press clause. Such a construction might find some support in early First Amendment history.⁶³

But such a definition of "the press" would be odd because it is both too narrow and too broad. It is too narrow in that it would exclude from "the press" those components of the media which deal in spoken rather than written expression. Television and motion pictures consist in large part, and radio in its entirety, in spoken rather than visual expression. If any substantive distinction is to be made between the rights of speech and press, in most contexts it would make little sense to vary the rights to be accorded various components of the media depending upon whether they deal in the spoken or the written word.⁶⁴ This conclusion is implicit in the Supreme Court's acknowledgment that broadcasters in particular, and "the media" in general are entitled to claim freedom of "the press."⁶⁵

But to regard "the press" as relating to all written expression would also constitute an unduly broad definition. It is true that the Supreme Court has said that "[t]he liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion,"⁶⁶ and, further, that it includes "the right of the lonely pamphleteer

62. See Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A.L. Rev. 29 (1973).

63. See text accompanying note 10 *supra*.

64. A defamatory statement if written is libel, and if spoken is slander (RESTATEMENT (FIRST) OF TORTS § 568 (1938)), with varying consequences flowing from this distinction. There is, however, a split of authority on whether radio and television broadcasts constitute libel or slander. Compare *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889 (W.D. Mo. 1934), *Sorensen v. Wood*, 123 Neb. 348, 243 N.W. 82 (1932), *Hartmann v. Winchell*, 296 N.Y. 296, 73 N.E.2d 30 (1947) (note particularly the opinion of Fuld, J., concurring, discussing the varying views in detail, *id.* at 300-05, 73 N.E.2d at 32-34), and *Shor v. Billingsley*, 4 Misc. 2d 857, 158 N.Y.S.2d 476 (Sup. Ct. 1956), with CAL. CIV. CODE § 46 (West 1954). Retraction statutes (for whatever vitality they may retain post-*Gertz*) may apply to both written and spoken defamation by the media. See, e.g., *id.* § 48a (applicable to both newspapers and radio).

In another context, the doctrine which asserts "a heavy presumption" against the constitutionality of prior restraints (see, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971)) may be seen as the favoring of "press" over "speech" since generally it is only the former which may be the subject of prior restraint.

65. See, e.g., *Gertz v. Robert Welch, Inc.*, 94 S. Ct. 2997 (1974); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948).

66. *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

who uses carbon paper or a mimeograph as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.”⁶⁷ Flexible as this concept may be in terms of sophistication of equipment and production cost, it would seem that something more is called for than the mere act of applying words to paper, even if followed by a transfer of the paper to a given individual. As the above quoted passage suggests, at the very least in order to qualify as a part of “the press” there must be a “publication.” That is, there must be an act of publishing in the copyright sense, *i.e.*, copies of the work must be made available to members of the public.⁶⁸

One who duplicates a document and then passes it on to an agent of a foreign government is in a sense engaged in an act of “speech” (whether or not protected by “freedom of speech”),⁶⁹ but it would be strange indeed to regard the actor as performing a function of “the press.” If the actor turns the same document over to the representative of a newspaper, which proceeds to publish it, we may well then regard the entire process as within the sphere of “press” activities. This distinction does not in itself tell us whether either the former or the latter act should be regarded as constitutionally protected, although I will argue below that at least in some circumstances the latter act should be protected when the former is not.⁷⁰ The point here to be made is that we both forego the possibility of analytical distinctions and do violence to the plain meaning of language if we indiscriminately regard any dissemination of printed material as an activity of “the press.” Whether the distinction is to turn on the copyright definition of publication or on some other standard,⁷¹ it is clear that accepted usage already distinguishes between visual materials which comprise a part of press activities and those which are speech but not press.

67. *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

68. See M. NIMMER, *NIMMER ON COPYRIGHT* § 49 (1974).

69. Cf. *United States v. Rosenberg*, 195 F.2d 583, 591-92 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952).

70. See note 81 & accompanying text *infra*.

71. In his dissent in *Saxbe*, Justice Powell pointed out that the Federal Bureau of Prisons employs a workable definition of “the press” for prison visitation purposes as including “[a] newspaper entitled to second class mailing privileges; a magazine or periodical of general distribution; a national or international news service; a radio or television network or station.” 94 S. Ct. at 2826. For a collection of 17 state statutes which provide for a “newsman’s” privilege, see *Branzburg v. Hayes*, 408 U.S. 665, 689 n.27 (1972). Later in the *Branzburg* opinion, however, the Court discusses the difficulty of defining “those categories of newsmen who qualified for the privilege.” *Id.* at 704.

The Functions of Speech and Press

Having concluded that it is possible to distinguish between press and speech activities, the question remains as to whether the "freedom" of the press should differ substantively from that accorded to speech. This introduction is intended only as the beginning of that inquiry. No more will be attempted here than to suggest certain guidelines and directions that may be helpful in delineating the constitutional relationship between press and speech.

An understanding of the press-speech relationship must begin with a brief review of the reasons why freedom of speech is important, in order to determine whether those reasons are equally applicable to freedom of the press. Mr. Justice Brandeis, in his concurring opinion in *Whitney v. California*,⁷² summed up the three major justifications for freedom of speech. First, free speech is a necessary concomitant of a democratic society. We cannot intelligently make decisions required of a self-governing people unless we are permitted to hear all possible views bearing upon such decisions. This is sometimes called the democratic dialogue function. Second, quite apart from its utility in the democratic process, freedom of expression is an end in itself. Self-expression is a part of self-fulfillment, or as Justice Brandeis suggested, liberty is "the secret of happiness."⁷³ Third, freedom of speech is a necessary safety valve. Those who are not permitted to express themselves in words are more likely to seek expression in violent deeds. There may be other justifications for freedom of speech but these are sufficient for our purposes.⁷⁴

Are these purposes equally applicable to freedom of the press? Speech on a one-to-one basis between friends, neighbors and fellow workers may sometimes prove more significant than the media in the shaping of public opinion. This is occasionally the case in a political context, and somewhat more frequently in other contexts, as with respect to critical reviews of books and films. The *succes d'estime* is a phenomenon sufficiently familiar to have been given a name. Still, these are the exception. The democratic dialogue rationale is eminently applicable to the press. The informing and opinion-shaping function of the press is unquestioned. Most would agree that generally speech via the press is much more significant as a contribution to the democratic dialogue than is speech through nonmedia channels.

72. 274 U.S. 357, 372 (1927).

73. *Id.* at 375.

74. For a more expanded treatment of these justifications, see *Right to Speak*, *supra* note 61.

The self-fulfillment function of speech finds little counterpart in relation to the press.⁷⁵ To be sure, the individual contributor to the press may experience self-fulfillment by the publication of his work. But for the press *qua* press, apart from the individual pamphleteer, it is unlikely that this is a significant factor. Even less relevant to the press is the safety valve aspect of speech.

In evaluating the significance of the differences between the speech and press functions, it is helpful to consider separately those situations in which the forces of speech and press pull in the same direction, and those in which they are antithetical. The prison visitation and defamation cases and, indeed, most First Amendment issues, fall in the former category. The access cases are an example of the latter. In *Pell* and *Saxbe* both the prisoners' speech claim and the media's press claim sought the same result, *i.e.*, prisoner interviews by the media. Moreover, the speech claim was not asserted independently of the press claim; both the prisoners and the media wanted the prisoners' speech to be disseminated via the press. In such circumstances the substantial democratic dialogue function of the press is combined with the prisoners' self-fulfillment and safety valve functions, as well as their own contribution to the democratic dialogue. The combined weight of the speech-press interests is considerable.

Against this the Court weighed the interests in prison administration, and found in particular that "security considerations"⁷⁶ outweighed the First Amendment interests. In concluding that the press should have no greater visitation rights than do members of the public, the Court ignored the separate and substantial democratic dialogue function of the press not present when prisoner speech is addressed simply to members of the public.⁷⁷ It also ignored the fact that security precautions against visitation abuses are much more feasible if only the press, and not the public generally, is permitted to designate given prisoners for interview. This is not to suggest that on balance the speech-press interest necessarily outweighs the prison administration interest. The point is, rather, that the Court cannot properly weigh these respective

75. *But see* *Branzburg v. Hayes*, 408 U.S. 665, 726-27 (1972) (Stewart, J., dissenting) ("the press enhance[s] personal self-fulfillment by providing the people with the widest possible range of fact and opinion").

76. 94 S. Ct. at 2806, 2808.

77. In his dissent in *Saxbe*, Mr. Justice Powell stated: "For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. . . . The press is the necessary representative of the public's interest in this context" 94 S. Ct. at 2821-22.

interests without examining separately the respective claims of speech and press. Either interest alone might not outweigh the prison administration interest, while the combined speech-press interests might. It is, then, submitted that the Court was wrong in blithely concluding in *Saxbe* that "it is unnecessary to engage in any delicate balancing [because] the sole limitation imposed on newsgathering . . . is no more than a particularized application of the general rule that nobody may enter the prison and designate an inmate whom he would like to visit, unless the prospective visitor is a lawyer, clergyman, relative, or friend of that inmate."⁷⁸

In the defamation cases the speech and press interests again pull in the same direction, *i.e.*, immunizing defamatory expression against the counter-interest in reputation.⁷⁹ But here, unlike the prisoner visitation cases, the speech and press interests are not necessarily combined. If Mr. Justice White's characterization of the scope of the majority opinion in *Gertz* is correct, then the Court has articulated a First Amendment rule of immunity for defamatory expression regardless of whether such expression is channeled through the media. The majority opinion itself, however, appears to be limited to media expression. One could construct an argument, based upon an evaluation of the speech and press interests outlined above, as to why the *Gertz* doctrine should be limited to media expression.

Defamatory statements appearing in the media generally consist of expressions by persons not themselves connected with the media, quoted in the media as "news." In such circumstances the speech values of self-fulfillment and, to some extent, democratic dialogue and safety valve which pertain to the speech of the person quoted are combined with the considerable democratic dialogue press interest. Together these may be said to outweigh the counter-interest in reputation. The balance might shift in favor of reputation if the democratic dialogue press interest is removed, as would be the case in nonmedia defamatory speech. The point, once again, is not that these respective balances are necessarily correct; it is only that the Court cannot properly assess the balance in each situation without distinguishing between the separable press and speech interests.

There is, moreover, an additional concomitant of media expression which may at times justify extending First Amendment protection to

78. *Id.* at 2814.

79. For an analysis of the speech and reputation interests which collide in a defamation action, see *Right to Speak*, *supra* note 61.

it though not to the same communication expressed through nonmedia channels. This relates to the public nature of media communication. Justice Brandeis told us: "If there be time . . . to avert the evil . . . the remedy to be applied is . . . not enforced silence."⁸⁰ Objectionable public statements via the media generally may be countered with "more speech." This is not usually the case with respect to nonmedia speech, wherein the fact of the communication itself may not be known until it is too late to counter it by corrective speech or other action. The application of this principle to the law of defamation is obvious, and it is clear that the injury to reputation may be no less devastating where there is a nonmedia defamatory communication.

Similarly, disclosure of governmental "secrets" to a foreign agent will not be known by the government, and hence corrective action by the government will not be possible. Disclosure to and publication by a newspaper will sometimes permit of such corrective action (this is in addition to the fact that the democratic dialogue interest of the public is served by newspaper disclosure and not by foreign agent disclosure). This is surely not to suggest that disclosure of governmental secrets to newspapers is necessarily protected by the First Amendment. Rather, it is to argue that in some circumstances the First Amendment line should be drawn differently depending upon whether there is a press disclosure or a nonmedia speech disclosure.⁸¹

Finally, we may consider those instances in which speech and press interests are in conflict. The access cases are a paradigm example. Unlike prison visitation and defamation, here the pull of press and of (nonmedia) speech is not in the same direction. The press does not wish to communicate the same expression as that urged by members of the nonmedia public. The Supreme Court in *Tornillo* and in *Democratic National Committee* opted in favor of "press," and in effect,

80. *Whitney v. California*, 274 U.S. 357, 377 (1927) (concurring opinion).

81. In this sense, the alleged disclosure by Daniel Ellsberg to the *New York Times* and *Washington Post* may be distinguished from the disclosures by Julius and Ethel Rosenberg and Alger Hiss. Some "secrets," no matter to whom they are disclosed, will give rise to criminal liability, as for example the atomic bomb information allegedly passed on by the Rosenbergs. But other information may be of a different order of sensitivity. The celebrated "pumpkin papers" in the Hiss case, for example, consisted for the most part of documents from the internal file of the Trade Agreements Section of the State Department. A. COOKE, *A GENERATION ON TRIAL* 162 (2d ed. 1952). As to less sensitive materials, whatever the statutory "classification," for First Amendment purposes a distinction may be made depending upon whether the dissemination is via secret "speech" or public "press." For a general discussion of the First Amendment status of governmental "secrets," see Nimmer, *National Security v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 STAN. L. REV. 311 (1974).

but not explicitly, against "speech." One wonders whether the Court would have reached this same result had the nature of the opposing forces been more squarely faced. The impact on the democratic dialogue function is essentially the same regardless of whether a given matter appearing in a newspaper originated from its editorial staff or from outsiders who gain access to the press by reason of a right of reply statute or some similar device. But that dialogue is in fact furthered if proponents of more than one side of an issue are allowed to address the same media audience. Moreover, the self-fulfillment and safety valve functions are more readily applicable to the outsiders who seek access than to those within the confines of the editorial room. Thus, in these circumstances the claims of "speech" may actually outweigh those of "press."

There are, of course, counterarguments to be made. Serious questions of governmental control of the media and of the watering down of media messages that may result from state-enforced access requirements are not without substance.⁸² But the issue cannot be resolved merely by noting, as did the Court in *Tornillo*, that a right of reply statute "constitutes the [state] exercise of editorial control and judgment."⁸³ This is but one half of the equation. The Court in *Tornillo* ignored the strong conflicting claims of "speech." Perhaps on

82. See the thoughtful concurring opinion of Mr. Justice Douglas in *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 148 (1973). For a most effective presentation of the case against access both in the broadcasting and newspaper contexts, see Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media*, 52 N.C.L. REV. 1 (1974). This writer, however, is not convinced that state-imposed access rules applicable to broadcasters or newspapers would necessarily result in state control of media content. That has not been the experience in the application of those access rules known as parade ordinances. See *Walker v. City of Birmingham*, 388 U.S. 307 (1967). Media access is, of course, much more complex, but given speech rights to be weighed against press rights, it is not clear that the press has the more persuasive case.

Professor Lange describes as "the access doctrine's most obvious cost: the possibility that the state may exercise its power to deny enforcement in some particular case. In conceptual terms the power to enforce also necessarily imports the power to withhold enforcement. Thus an obvious but nonetheless necessary cost of the access doctrine is that the state must acquire new powers not only to require particular publications but also to suppress them." Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media*, 52 N.C.L. REV. 1, 73 (1974). It is not clear to me how state denial of a right of access to a given work constitutes state "suppression" of that work unless the only means of publication in a given medium is via a state-imposed access route. Absent such an access monopoly, a given work which has been denied a state right of access retains substantially as much or as little opportunity for voluntary media publication as would have been the case without state access machinery.

83. 94 S. Ct. at 2840.

balance the press should still prevail, but those who doubt the efficacy of such a result are hardly persuaded by an approach that apparently fails to recognize that any balancing of speech and press rights is required.

In sum, the last term of the Supreme Court provided vivid illustrations of the variety of circumstances in which the First Amendment freedoms of speech and of the press may represent different interests, be they harmonious or discordant. Whatever the eventual results of any rebalancing of First Amendment rights in light of such a differentiation, freedom of the press as a right recognizably distinct from that of freedom of speech is an idea whose time is past due.

HEINONLINE

Citation: 75 Mich. L. Rev. 1 1976-1977

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Tue May 3 07:21:18 2011

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0026-2234](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0026-2234)

FREEDOM OF THE PRESS AND PUBLIC ACCESS: TOWARD A THEORY OF PARTIAL REGULATION OF THE MASS MEDIA

Lee C. Bollinger, Jr.†*

During the past half century there have existed in this country two opposing constitutional traditions regarding the press. On the one hand, the Supreme Court has accorded the print media virtually complete constitutional protection from attempts by government to impose affirmative controls such as access regulation. On the other hand, the Court has held affirmative regulation of the broadcast media to be constitutionally permissible, and has even suggested that it may be constitutionally compelled. In interpreting the first amendment, the Court in one context has insisted on the historical right of the editor to be free from government scrutiny, but in the other it has minimized the news director's freedom to engage in "unlimited private censorship"¹ and has exalted the "right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences."² The opinions in each area stand apart, carefully preserved through a distinctive core of precedent, analysis and idiom.

The purpose of this article is to examine critically these decisions and to explore whether there is any rational basis for limiting to one sector of the media the legislature's power to impose access regulation.³ The article takes the position that the Court has pursued the

* Associate Professor of Law, University of Michigan. B.S. 1968, University of Oregon; J.D. 1971, Columbia University.—Ed.

† I am grateful to my colleagues Vince Blasi, Richard Lempert, Don Regan, Terry Sandalow and Joe Vining and to Geoffrey Stone of the University of Chicago Law School for their helpful comments and criticisms in the preparation of this article. I am especially indebted to my colleague Joe Sax and to Bo Burt of the Yale Law School for their instruction and guidance.

1. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

2. 395 U.S. at 392.

3. The term "access regulation" encompasses a variety of quite different forms of regulation. It can refer to a legal obligation to cover all points of view on any public issue as well as to a more modest rule that simply forbids discrimination in the acceptance of proffered advertisements. The underlying principle for the regulation can vary along with its scope and impact on the press. It may be designed to protect reputations, to equalize opportunities of citizens to present their points of view on certain issues, or to maximize the amount of information available to the public. See B. SCHMIDT, *FREEDOM OF THE PRESS VS. PUBLIC ACCESS* ch. 2 (1976).

It is certainly not the purpose of this article to assert that all forms of access

right path for the wrong reasons. There is a powerful rationality underlying the current decision to restrict regulatory authority to broadcasting, but it is not, as is commonly supposed, that broadcasting is somehow different in principle from the print media and that it therefore is not deserving of equivalent first amendment treatment. As will be discussed in section I, the Court's attempt to distinguish broadcasting on the basis of its dependence on scarce resources (the electromagnetic spectrum) is unpersuasive; moreover, whatever validity the distinction may once have had is now being undercut by the advance of new technology in the form of cable television.⁴ Further, other possible points of distinction that may be raised, such as the broadcasting industry's high level of concentration and television's purported special impact on its viewers, do not presently justify the different first amendment treatment. For reasons that will be developed in section II, access regulation has been treated differently in the context of broadcasting than it has in that of the print media largely because we have long *assumed* that in some undefined way broadcasting is, in fact, different. Rather than isolate broadcasting from our constitutional traditions, however, the Court should now acknowledge that for first amendment purposes broadcasting is not fundamentally different from the print media. Such an admission would not compel the Court either to permit access regulation throughout the press or to disallow it entirely. There is, we shall see, an alternative solution.

There has recently been a dramatic outpouring of articles addressing the issues associated with access regulation in the press.⁵ This literature demonstrates the dual constitutional nature of regulation: It can be at once a valuable, indeed essential, means of redressing the serious inequality in speech opportunities that exists today within the mass media *and* a dangerous deviation from our historical commitment to a free and unfettered press. The problem, therefore, is formulating a constitutional approach that captures the benefits of access regulation yet still minimizes its potential excesses.

regulation are permissible; nor is it to specify which ought to be constitutionally sanctioned and which not. The assumption is made, primarily on the basis of the Court's holding in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), *discussed in* text at notes 14-34 *infra*, that access regulation in *some form* is constitutionally acceptable. The purpose of the article is to address the theoretical problems raised by the next question: the extent to which the Constitution ought to be construed as permitting such regulation within the mass media.

4. See text at notes 112-15 *infra*.

5. For an exhaustive listing of articles, see Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C. L. REV. 1, 2 n.5 (1973).

These first amendment goals, it will be argued, can be achieved by permitting legislative access regulation but sharply restricting it to only one segment of the mass media, leaving the choice of the area of regulation to Congress. Without adequately explaining or perhaps even comprehending its decisions, the Supreme Court has actually reached the constitutionally correct result in refusing to permit government regulation of the print media, but has done this only because Congress had already chosen to regulate the broadcast media.

I. THE FIRST AMENDMENT AS PORTMANTEAU

In 1974, when the Court considered the constitutionality of access regulation in the print media,⁶ it was able to turn to a long-standing constitutional tradition. Our society has generally been committed to the notion that, with a few narrow exceptions, the government should stay out of the business of overseeing editorial discretion in the press.⁷ Our historical experience has given rise to a hearty skepticism of the ability of officials to decide, for example, what is "fair" political debate. This skepticism recognizes the corruptibility of government and its seemingly innate desire to magnify whatever power over the press it might possess at a given time. The longstanding conception of the press as a "fourth branch" of government has seemed antithetical to the idea that the state should have power to affect its content. Even the most ardent advocates of access legislation have never sought to claim historical respectability for their proposals; theirs is the argument of changed circumstances.⁸

At issue in *Miami Herald Publishing Co. v. Tornillo*⁹ was a Florida statute requiring a newspaper in the state to publish without cost the reply of any candidate criticized in its columns.¹⁰ In a rela-

6. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

7. See, e.g., 2 Z. CHAFEE, *GOVERNMENT & MASS COMMUNICATIONS* 477 (1947).

8. See, e.g., Barton, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). See also the Court's summary of the access proponents' arguments in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247-54 (1974).

9. 418 U.S. 241 (1974).

10. The statute provided:

104.38 *Newspaper assailing candidate in an election; space for reply*—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of

tively brief and conclusory opinion, the Court surveyed prior print media cases and found implicit in them the proposition that "any . . . compulsion [by the government on newspapers] to publish that which 'reason' tells them should not be published is unconstitutional."¹¹ Access regulation violates that principle because it intrudes "into the function of editors"¹² and because, as the Court assumed, although there was no evidence on the point, it also creates an impermissible risk of a chilling effect on news content.¹³

What seems so remarkable about the unanimous *Miami Herald* opinion is the complete absence of any reference to the Court's unanimous decision five years earlier in *Red Lion Broadcasting Co. v. FCC*.¹⁴ In that case, the Court upheld two component regulations of the Federal Communications Commission's "fairness doctrine,"¹⁵

this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

FLA. STAT. § 104.38 (1973). Enacted in 1913, Law of June 6, 1913, ch. 6470, § 12, 1913 Fla. Laws 274, the statute had slumbered peacefully until the 1970s. In the only other reported case, the statute was held unconstitutional. *State v. News-Journal Corp.*, 36 Fla. Supp. 164 (Volusia County Judge's Court, Fla. 1972). The Supreme Court noted that "in neither of the two suits, the instant action and the 1972 action, has the Florida Attorney General defended the statute's constitutionality." 418 U.S. at 247 n.7.

11. 418 U.S. at 256.

12. 418 U.S. at 258. As the Court said:

The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

418 U.S. at 258.

13. The chilling effect was described in the following terms:

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably "dampens the vigor and limits the variety of public debate," *New York Times Co. v. Sullivan* . . .

418 U.S. at 257.

Justice Brennan wrote a concurring opinion in *Miami Herald*, in which Justice Rehnquist joined, expressing his understanding that the Court's decision indicated no "view upon the constitutionality of 'retraction' statutes affording plaintiffs able to prove defamatory falsehoods a statutory action to require publication of a retraction," 418 U.S. at 258. Justice White also filed a concurring opinion that stated:

We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer "the power of reason as applied through public discussion" and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.

418 U.S. at 259 (footnotes omitted).

14. 395 U.S. 367 (1969).

15. Developed over the years under the Commission's general power to promul-

one of which, the so-called personal attack rule,¹⁶ is almost identical in substance to the Florida statute declared unconstitutional in *Miami*

gate regulations consistent with the "public interest," 47 U.S.C. §§ 303, 307 (1970), the doctrine requires broadcasters to provide adequate and fair coverage of opposing viewpoints on controversial issues of public importance. The substance of these obligations was set forth in early Commission decisions. See *Great Lakes Broadcasting Co.*, 3 F.R.C. Ann. Rep. 32, 33 (1929), *revd. on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930); *Trinity Methodist Church, South v. FCC*, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933). However, the first official policy statement explaining the doctrines in detail was not issued by the Commission until 1949. See REPORT ON EDITORIALIZING BY BROADCAST LICENSEES, 13 F.C.C. 1246 (1949). Congressional endorsement of the doctrine followed ten years later. Act of Sept. 14, 1959, Pub. L. No. 86-274, § 1, 73 Stat. 557, *amending* 47 U.S.C. § 315(a) (1958) (codified at 47 U.S.C. § 315(a) (1970)); see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-82 (1969).

Another well-known regulation of this genre is the equal time rule. A feature of the statutory scheme since the beginning, the rule provides that a broadcaster who permits a political candidate to "use" his station must "afford equal opportunities to all other such candidates for that office in the use of such broadcasting station." 47 U.S.C. § 315 (Supp. V 1975).

The broadcast media has, of course, been subject to extensive legal restraints beyond access regulation since the passage of the Radio Act in 1927. Radio Act of 1927, ch. 169, 44 Stat. 1162. Congress acted in that year in response to a massive problem of signal interference, which threatened the life of the new technology, and "under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). Within the space of about a decade, radio had grown in popularity and social importance to such an extent that intervention was necessary to allocate the small number of available frequencies. Congress delegated this responsibility to the Federal Radio Commission, vesting it with authority to issue licenses and promulgate regulations consistent with the public "convenience, interest, or necessity." Radio Act of 1927, ch. 169, § 4, 44 Stat. 1163. The Federal Communications Act was passed in 1934, but aside from renaming the Commission, the essential nature of radio regulation was left unchanged. Communications Act of 1934, Tit. III, ch. 56, 48 Stat. 1081, *as amended by* 47 U.S.C. §§ 301-395 (1970). The professed object of the new enterprise remained to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide wire and radio communications service." 47 U.S.C. § 151 (1970).

16. The regulation covering personal attacks and political editorials provides as follows:

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall not be applicable (1) to attacks on foreign groups or foreign public figures; (2) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with the candidates in the campaign; and (3) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) of this section shall be applicable to editorials of the licensee).

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for

Herald. That omission, however, is no more surprising than the absence of any discussion in *Red Lion* of the cases in which the Court expressed great concern about the risks attending government regulation of the print media.

Instead of scrutinizing government regulation of broadcasting in light of the print media cases and our traditional reservations about government oversight of the press, the Court in *Red Lion* regarded broadcasting as a "unique medium"¹⁷ that needed a distinctive first amendment analysis. Specifically, the Court plunged ahead to assert for the first time the incompatibility of a concentrated medium, which is how it characterized broadcasting, with the first amendment goals expressed in the Holmesian metaphor of the "market-place of ideas."¹⁸ The marketplace theme as developed in *Red Lion* states that when, as now, the channels of communication are effectively controlled by a few interests, there is the risk that many important voices will be excluded and that, as a consequence, the public will be seriously hampered in its efforts to conduct its affairs wisely. Unless the government intervenes to insure the widespread availability of opportunities for expression within the mass media, the objectives of the first amendment may be frustrated. Thus, the Court reasoned in a frequently quoted passage:

Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public. Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all.¹⁹

These constitutional principles are an elaboration of the "scarcity

the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however*, That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

47 C.F.R. § 73.123 (1973).

17. 395 U.S. at 390.

18. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

19. 395 U.S. at 392.

doctrine" first articulated in *National Broadcasting Co. v. United States (NBC)*,²⁰ in which Justice Frankfurter argued that because radio was "inherently . . . not available to all" it was "unique" and therefore "subject to governmental regulation."²¹ Needless to say, the opinion in *Red Lion* reflects a far different attitude toward the relationship between editors and government than that in *Miami Herald*.

20. 319 U.S. 190 (1943). The broadcasters in *NBC* challenged on statutory and constitutional grounds the so-called chain broadcasting regulations, designed by the Commission to regulate various aspects of a network's relationship with its affiliated stations. See 319 U.S. at 198-209.

21. 319 U.S. at 226. Justice Frankfurter's discussion of the constitutional issues (he disposed of the statutory claims early in the opinion, 319 U.S. at 215-26) was to become the classic statement of the justification for government regulation in broadcasting:

We come, finally, to an appeal to the First Amendment. The regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied.

319 U.S. at 226-27. The focus, ultimately, was to be on the public interest served by licensing:

The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices . . . is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity." Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

319 U.S. at 226-27.

Justice Frankfurter's analysis was hardly satisfying. It addressed the question whether the government could constitutionally deny a license to any applicant, an issue not raised by the broadcasters, and held that the scarcity of a major resource used in broadcasting (the electromagnetic spectrum), which is not sufficiently plentiful to supply all who wish to broadcast, justified a governmental licensing scheme. Justice Frankfurter completely failed to address other crucial questions: Why was the *method* chosen for allocation of licenses constitutional? If the method were constitutional, what limitations did the first amendment impose on its administration? And, why were these regulations not subject to those limitations? Perhaps the kindest comment on Justice Frankfurter's treatment of the constitutional issue was made by Professor Kalven, who observed that the "passage catches a great judge at an unimpressive moment." Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON. 15, 43 (1967). See also T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 657 (1970). Nevertheless, the physical scarcity thesis became the principal rationale for distinguishing broadcasting from the print media and the basis for regulation in the "public interest," see 2 Z. CHAFEE, *supra* note 7, at 638, although other rationales occasionally surfaced. See, e.g., *Columbia Broadcasting Sys., Inc. v. Democratic Natl. Comm. (CBS)*, 412 U.S. 94, 101, 126 (1973) (referring to "public domain" thesis that broadcasters could be regulated because they used the "publicly owned" airspace).

A comparison of *Red Lion* and *Miami Herald*, however, reveals more than different first amendment motifs. The tone and attitude manifested in these cases toward the proper limits of governmental intervention are entirely dissimilar. In *Miami Herald*, the Court clearly and firmly opposed any further experimentation with access legislation, while in *Red Lion*, the Court acted as if it were reviewing a decision of an administrative agency where great weight had to be paid to the agency's expertise in dealing with a "new technology of communication." Illustratively, the Court in *Red Lion* responded to the broadcasters' claim that the right-of-reply regulations created an impermissible chilling effect by displaying deference toward the FCC's determination that the possibility of such an effect was "at best speculative."²² This approach is in sharp contrast to the Court's later assertion in *Miami Herald* that access regulation "inescapably 'dampens the vigor and limits the variety of public debate.'"²³

An even more significant example of the Court's leniency towards governmental experimentation with access regulation in broadcasting is the Court's response in *Red Lion* to the broadcasters' claim that, although there once might have been technological scarcity, the situation had changed significantly.²⁴ The broadcasters' argument was hardly frivolous. The development of the UHF (ultra high frequency) portion of the spectrum had greatly expanded the total number of available channels, and when the Court considered the issue, a significant number were (and continue to be) unused.²⁵

22. See 395 U.S. at 393.

23. 418 U.S. at 257, quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

24. 395 U.S. at 396.

25. In a footnote, the Court set forth the following table that had been prepared by the Commission as of August 31, 1968:

COMMERCIAL

Market Areas	Channels Allocated		Channels on the Air, Authorized, or Applied for		Available Channels	
	VHF	UHF	VHF	UHF	VHF	UHF
Top 10 _____	40	45	40	44	0	1
Top 50 _____	157	163	157	136	0	27
Top 100 _____	264	297	264	213	0	84

NONCOMMERCIAL

Market Areas	Channels Allocated		Channels on the Air, Authorized, or Applied for		Available Channels	
	VHF	UHF	VHF	UHF	VHF	UHF
Top 10 _____	7	17	7	16	0	1
Top 50 _____	21	79	20	47	1	32
Top 100 _____	35	138	34	69	1	69

1968 FCC Annual Report 132-35.

395 U.S. at 398 n.25.

On several occasions, moreover, the FCC had denied a license to a single applicant for a particular VHF (very high frequency) frequency because the applicant had failed to meet the Commission's programming requirements or because granting the license would have had an adverse *economic* impact on existing stations in the community.²⁶ In light of these facts, the broadcasters surely might have expected a Court concerned with freedom of the press to limit carefully the government's exercise of regulation to those situations consistent with the constitutional rationale adopted in *NBC*—that is, to instances where there was truly "physical scarcity."

This was not, however, the *Red Lion* Court's focus. Instead, the Court was primarily concerned with society's interest in establishing priorities for use of new technologies and was willing to affirm regulation that may not have been needed at that time to promote traditional first amendment interests:

The rapidity with which technological advances succeed one another to create more efficient use of spectrum space on the one hand, and to create new uses for that space by ever growing numbers of people on the other, makes it unwise to speculate on the future allocation of that space. It is enough to say that the resource is one of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress. Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated, and for which *wise planning* is essential.²⁷

Instability would result, the Court surmised, if the Commission could only intervene when the demand suddenly exceeded the supply of frequencies in a community. In any event, it was thought, existing broadcasters had obtained such "advantages" by virtue of government selection that "[s]ome present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest."²⁸

The point of this comparative analysis of *Red Lion* and *Miami Herald* can be clarified by juxtaposing what the Court both articulated and failed to articulate in these decisions. The Court in *Red Lion* introduced a new principle into our first amendment jurisprudence. Essentially, that principle provides that when only a few interests control a major avenue of communication, those able to speak can be forced by the government to share. The initial logic

26. See, e.g., *Henry v. FCC*, 302 F.2d 191 (D.C. Cir. 1962).

27. 395 U.S. at 399 (emphasis added).

28. 395 U.S. at 400.

supporting the principle is clear: If it is accepted that a principal objective of the first amendment is to assure the widespread dissemination of various points of view, then any serious constriction of the available methods of communication would seem to justify some remedial action. Applying this logic to broadcasting, the Court found that concentration there justified action *and* that access regulation is an appropriate legislative response.

Equally important, on the other hand, is what the Court has failed to say in its decisions on access regulation. It is clear that the Court has not made explicit just what is so "unique" about the broadcast media that justifies legislative action impermissible in the newspaper context. It is doubtful that the so-called scarcity rationale articulated in *NBC* and *Red Lion* provides an explanation. Certainly the scarcity rationale explains why Congress was justified in devising an allocation scheme to prevent the overcrowding of broadcasting frequencies. It may also serve to explain in part why the television industry is so concentrated.²⁹ The scarcity rationale does not, however, explain why what appears to be a similar phenomenon of natural monopolization within the newspaper industry does not constitute an equally appropriate occasion for access regulation.³⁰ A

29. See note 30 *infra*.

30. See, e.g., B. SCHMIDT, *supra* note 3, at ch. 4. It is difficult to compare effectively the extent of concentration in the broadcast and newspaper media. There are 8,760 broadcast stations, compared with 1,733 English language daily newspapers. See BROADCASTING, YEARBOOK 1975, at A-2; NEWSPAPER ENTERPRISE ASSOCIATION, 1975 WORLD ALMANAC 303 (1974). However, most of the broadcast outlets are radio stations (7,807), leaving 954 television stations (513 Commercial VHF, 198 commercial UHF, 95 noncommercial VHF and 147 noncommercial UHF). BROADCASTING, YEARBOOK 1975, at A-2. Other data, however, complicate the picture. A relatively recent assessment of the effects of media concentration noted:

From 1945 to 1970, the number of U.S. cities with competitive daily newspapers fell from 117 to 63, while the total number of dailies remained nearly constant. By 1973, only 55 competitive newspaper cities remained, and only the very largest cities such as New York and Chicago supported competitive morning or evening dailies. Moreover, 20 of the 55 cities retain daily newspaper competition only through joint operating agreements by which two newspapers share printing and business operations.

W. BAER, H. GELLER, J. GRUNDFEST, K. POSSNER, CONCENTRATION OF MASS MEDIA OWNERSHIP: ASSESSING THE STATE OF CURRENT KNOWLEDGE 35 (1974) (footnotes omitted). At a later point, the study further compares the national concentration of ownership in television and newspapers: "There are nearly 400 television station owners, but the fifty largest group owners serve 74 percent of the total daily audience. Among the more than 1,000 newspaper publishers, the fifty largest control 58 percent of all circulation." *Id.* at 57-58.

The point here is not to establish a methodology for measuring comparatively the risks of concentration in the electronic and print media but rather to support the less controversial proposition that the evils of concentration—to the extent that they exist—would appear to be a problem within the newspaper context as well as the broadcast media. See Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67, 156-59 (1967).

difference in the cause of concentration—the exhaustion of a physical element necessary for communication in broadcasting as contrasted with the economic constraints on the number of possible competitors in the print media—would seem far less relevant from a first amendment standpoint than the fact of concentration itself. Thus, it might be argued that a person “attacked” in the *Washington Post*, or one who holds a different viewpoint than that expressed in that newspaper, is able to publish a pamphlet or his own “newspaper” in response. But does this have any more appeal than a similar argument with respect to the Columbia Broadcasting System?

It is true, of course, that a person with the requisite capital and inclination could, theoretically, always establish his own newspaper if the local print media refused to publish his point of view, whereas it is highly unlikely that he could establish his own broadcast station if the local stations refused to cover his viewpoint. But this seems a slim basis on which to predicate such dramatically different constitutional treatment. Even if we assume greater ease in entering the print media, however, the question remains why the purported openness of the newspaper market should not be considered an important factor in assessing the significance of concentration in the broadcast media. Why, this analysis asks, did the Court in *Red Lion* treat the broadcast media as separate and discrete? Why did the Court, in an exercise similar to defining the “relevant market” in an antitrust case, narrow its focus to a particular segment of the mass media? Why did the Court not say that, so long as people can gain access somewhere within the mass media, there is no need for legislative action in any concentrated branch? The treatment of the broadcast media as discrete constitutes at least implicit acknowledgement that the newspaper and other major print media are also highly restricted. If anyone could set up a major newspaper, would we really care if entry into the broadcast media was physically precluded? Or is the explanation somehow hinged to the nature of the regulatory scheme itself?

The fact is that the Court has never sought to answer the difficult questions relating to the scope of the new constitutional principle.³¹

31. In a concluding footnote to the *Red Lion* opinion, the Court seemed to leave open the question whether the cause of concentration could ever be important:

We need not deal with the argument that even if there is no longer a technological scarcity of frequencies limiting the number of broadcasters, there nevertheless is an economic scarcity in the sense that the Commission could or does limit entry to the broadcasting market on economic grounds and license no more stations than the market will support. Hence, it is said, the fairness doctrine or its equivalent is essential to satisfy the claims of those excluded and of the public generally. A related argument, which we also put aside, is that quite apart from scarcity of frequencies, technological or economic, Congress does not

The Court in *Miami Herald* acknowledged the argument that the increased concentration within the newspaper industry constituted changed circumstances justifying affirmative governmental action but offered little in the way of satisfactory explanation.³² Instead of exploring the relevance for the print media of the new principle developed in broadcasting, the Court merely reiterated the opposing, more traditional, principle that the government cannot tell editors what to publish.³³ It thus created a paradox, leaving the new principle unscathed while preserving tradition.³⁴

There thus now exists an unresolved tension between the constitutional themes that have been drawn in the electronic and print media. As will be shown below, however, this does not mean that the tension cannot be resolved.

II. TOWARD A FIRST AMENDMENT THEORY

. . . a law of inherent opposites, Of essential unity, is as pleasant as port³⁵

The preceding section has attempted to demonstrate the unpersuasiveness of the scarcity argument: Concentration is not unique to broadcasting and, in any case, the scarcity rationale has no application to the cable technology³⁶ where questions of access regulation are now brewing. Thus, even for those who have embraced it, the rationale is at best a short-term answer to what appears to be a long-term problem. It is, therefore, now important to inquire whether there is any basis other than the scarcity doctrine for denying Con-

abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication with the general public.
395 U.S. at 401 n.28.

32. 418 U.S. at 249-51.

33. 418 U.S. at 258.

34. One possible key to understanding *Miami Herald* might lie in the fact that the case involved a *state* attempt to impose access regulation on the press. It is possible, in other words, that the Court was moved to reach the result it did because it thought it would be too difficult to supervise regulatory experiments in 50 states or that, for somewhat different reasons, this area of access regulation has become a matter exclusively of federal concern. For reasons that will be developed later, I believe that *Miami Herald* would have—and should have—been decided the same way if the regulations had been of federal origin. See text at notes 82-102 *infra*. That is not to say, however, that in circumstances where it is thought to be constitutionally appropriate to impose access regulation, Congress, in contrast to the states, would not have a special role to play in seeking to implement first amendment goals. Cf. *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

35. W. STEVENS, *Connoisseur of Chaos*, in COLLECTED POEMS OF WALLACE STEVENS 167 (1954).

36. See note 112 *infra*.

gress the authority to extend access regulation beyond the already-regulated electronic media.

A. *Comparison of the Electronic and Print Media*

The customary approach to the problem of disparate treatment of the electronic and print media has been to line them up side by side and see whether there are any differences between them that justify the result. It is implicitly assumed that if broadcasting cannot be distinguished from the print media, it must be treated similarly; if it is different, then it can be regulated to the extent that the differences allow. The scarcity analysis, which focuses exclusively on broadcasting without making express comparisons and which argues that this branch of the communications media possesses a "unique" characteristic of concentration, is one such attempt to isolate a difference that would permit separate treatment. Although that difference apparently should fail the test of materiality, there may be more appropriate distinctions, such as a possible qualitative difference of degree in levels of concentration and a reputed special impact of television on its viewers.

Irrespective of the cause of concentration within each branch of the media, television is in some respects more concentrated than any segment of the print media. There are fewer television stations, for example, than daily newspapers,³⁷ but even more significantly, fewer interests control the content of television broadcasting than is true within the newspaper industry. In television an oligopoly of three networks commands the attention of a vast percentage of the television audience, while in newspapers the concentration is more dispersed, with monopolization on a local, regional, or more limited, national level.³⁸

This might not be regarded as very significant if few people watched television, but, of course, the situation is quite the reverse. In many important respects, television is today the most pervasive medium of communications in our society. Not only does virtually everyone have access to a television set, but more people watch it, even for purposes of obtaining news, and for longer periods, than read the publications of the print media.³⁹ In addition, television is frequently considered to have a "special impact" on its audience. Thus, many

37. See note 30 *supra*.

38. See Barrow, *Program Regulation in Cable TV: Fostering Debate in a Cohesive Audience*, 61 VA. L. REV. 515, 530 (1975).

39. See E. EPSTEIN, *NEWS FROM NOWHERE* 9 (1973); B. SCHMIDT, *supra* note 3, at 120.

courts and commentators believe television is today the dominant means of influencing public opinion, not only because more people watch it than read newspapers, but also because it possesses some undefined and unquantifiable, but nevertheless unique, capacity to shape the opinions of the viewers in ways unrelated to the merits of the arguments presented.⁴⁰ The television medium, it is also said, offers the opportunity to thrust information and ideas onto the audience. Unlike printed publications, which can be avoided by "averting the eyes,"⁴¹ television provides the opportunity to force extraneous messages onto audiences gathered for other purposes.⁴² This medium, in short, may be the preeminent forum for the discussion of ideas and viewpoints in the society and it may offer opportunities to persuade that cannot be matched elsewhere within the system of expression. The greater concentration of power in television, therefore, may arguably represent more serious social and first amendment problems than the situation in the print media.⁴³

This line of argument, promising though it may seem, contains several serious problems. First, the analysis fails to explain why the current level of concentration in newspapers, even assuming that it is not as high as that in television, is not sufficiently troublesome by itself to justify governmental intervention. The monopoly status of so many of our community newspapers does not present a happy prospect for the first amendment. Beyond some point, the level of concentration seems to become irrelevant to constitutional doctrine. The question to be asked, therefore, is not whether broadcasting is more concentrated than the print media, but whether both have passed beyond the point of safety for first amendment purposes.

It seems reasonable to believe that, if concentration in broadcasting has passed an acceptable level, concentration in newspapers has also reached a similar level. Are the abuses of journalistic power and one-sidedness more likely in the electronic than in the print media?

40. See, e.g., *Banzhaf v. FCC*, 405 F.2d 1082, 1100-01 n.77 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969).

41. *Cohen v. California*, 403 U.S. 16, 21 (1971).

42. *Cohen v. California*, 403 U.S. 16, 21 (1971). The Supreme Court has also noted the "captive" nature of the broadcast audience. See *Columbia Broadcasting Sys., Inc. v. Democratic Natl. Comm.*, 412 U.S. 94, 127-28 (1973).

43. Cf. L. TRIBE, *CHANNELING TECHNOLOGY THROUGH LAW* 29 (1973):

Almost as difficult as conceiving of cumulative trends is imagining the effects of scale. Barely 100,000 television receivers were in use in the United States in 1948. In the next year there were a million. A decade later there were 50 million. The social and psychological consequences of such phenomenal growth are hard even to contemplate, let alone predict. Indeed, in the case of television these effects are still a matter of debate, and apparently adequate research tools for measuring or evaluating them do not yet exist.

Is the access for new ideas more problematical in the broadcast than in the print media? Certainly there is no empirical evidence supporting affirmative answers to these questions, and their validity as intuitive propositions is subject to doubt. Television is characterized more by its placidity than by its politicization.⁴⁴ Moreover, newspapers are a primary source of news for television, and the print media may instead prove to be the first line of defense against new ideas.⁴⁵ Further, it is significant that in television there are three independently owned national networks vying for viewers, a potentially important systemic check against distortion that is lacking in communities with only a single newspaper. Finally, the major networks do control the content of prime-time television, but the major wire services, such as Associated Press and United Press International, similarly control much of the national news reported in newspapers throughout the country, although perhaps to a somewhat lesser degree.

Even more problematical, however, is the alleged special impact of television. Quite apart from any natural suspicions concerning the validity of the claim, given the frequency with which it seems to confront each new medium of communications,⁴⁶ the impact thesis is a dangerously amorphous justification for regulation. It provides no clear limits to official authority and invites censorship as well as affirmative regulation. Further, in so far as the thesis rests upon the premise that regulation is more acceptable the greater the audience and the impact, it seems inconsistent with the underlying purpose of the first amendment, which presumably is to protect effective as well as ineffective speech. A comparison of the gross audience figures is, in any event, a clumsy basis on which to gauge the differing effects of various media on the formation of public opinion or policy. Use of such data alone completely ignores the insights of political scientists into the complexity of cognition and decision-making.⁴⁷ Finally, there is simply no evidence at the present time to support the proposition that television shapes attitudes and ideas in ways so unprecedented as to require urgent remedial regulation. Thus, until more evidence exists to support the theory, or perhaps until a much wider consensus is formed in its support, it seems wise to avoid relying on the special impact theory.

44. See generally E. EPSTEIN, *supra* note 39.

45. See generally *id.*

46. See, e.g., *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961) (motion pictures).

47. See generally R. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* (1967).

This discussion does not mean to suggest that the line of analysis focusing on the potential differences between television and newspapers and magazines is unworthy of further investigation. On the contrary, the issues raised are highly important and should continue to command attention. On the whole, however, the arguments presently contain too many doubtful underlying assumptions to support a conclusion that the media are fundamentally different. Differences indeed exist, but they are either too insignificant to justify momentous distinctions in treatment under the first amendment or too broad and vacuous to be persuasive. We must, therefore, conclude that they are the same.⁴⁸

It is at this point that conventional thinking about broadcast regulation largely stops. Once it is determined that the broadcast and print media are constitutionally indistinguishable, then it is concluded that the Court's theory of access regulation is without rational foundation and should be discarded at the earliest opportunity.⁴⁹ Such a conclusion possesses a certain legalistic appeal, but it also may be an oversimplification. The very weakness of the scarcity rationale suggests that there is something more here than first meets the eye. The dual treatment of the press has been so long accepted, even by persons known for their sensitivity to first amendment values,⁵⁰ that the scarcity rationale may in fact be a convenient legal fiction covering more subtle and important considerations.

It is helpful, therefore, to adopt a less formalistic approach to the problem and to probe beyond normal legal analysis to account for this remarkable constitutional development. For even if broadcasting and the printing press are essentially the same, they nevertheless have different origins, have existed for different periods of time, and one has been controlled from its beginnings while the other has been left unrestricted. It is important, in short, that our analysis be sensitive to the historical process through which the present system has developed.

Such an approach reveals two closely interrelated factors that help reconcile the divergent traditions within the press. First, society has long considered broadcasting to be meaningfully different

48. The following discussion would still be important even if there existed a serious possibility of a material difference justifying regulation only of the electronic media. If regulation is properly limited on a basis other than the differences suggested above—as is argued in the text below—the Court need not undertake the troublesome and frequently ephemeral task of making comparisons as the bases for their decisions.

49. See *Lange*, *supra* note 5.

50. See, e.g., 2 Z. CHAFEE, *supra* note 7, at 640-41.

from the print media, and this perception has greatly influenced the decision to allow regulation only in the former. Understanding this perception and its effects is necessary for an appreciation of the complex way in which first amendment theory is implemented and developed. Second, broadcast regulation involves only a *part* of the press; this fact provides not only an explanation for past treatment by the courts but also offers the most rational basis for future constitutional adjudication in this area.

B. *Divergent Societal Perceptions of Broadcasting and Print Media*

The phenomenon of broadcast regulation has, in many respects, the qualities of an historical accident. An examination of its origins and development reveals the striking ease with which it slid into our political and constitutional system. One stark fact is apparent: Society obviously has *thought differently* about broadcasting than it has about the print media. Certainly doubts and objections have been raised periodically,⁵¹ but on the whole there have not been the outcries against censorship that would undoubtedly have occurred if regulation had been imposed on newspapers.⁵² Broadcasters, although often lamenting what they considered to be public insensitivity to their first amendment rights, have been conspicuously unassertive of their rights.⁵³ Even the scholarly community has tended to overlook the significance of the constitutional treatment of broadcasting. Major casebooks published as late as 1965, for example, did not even mention either the existence of broadcast regulation or the seminal *NBC* decision.⁵⁴ Even after *Red Lion*, major casebooks did not present broadcast regulation as posing a significant constitutional dilemma; broadcast decisions were merely described briefly in a note format.⁵⁵ A recently published major casebook continues to describe the broadcast decisions in a long note, does not address the broader first amendment significance of the decision to regulate, and

51. See, e.g., Kalven, *supra* note 21; Robinson, *supra* note 30.

52. "In brief, we all take as commonplace a degree of government surveillance for broadcasting which would by instant reflex ignite the fiercest protest were it found in other areas of communication." Kalven, *supra* note 21, at 16. See also 2 Z. CHAFEE, *supra* note 7, at 637.

53. Writing before *Red Lion*, Professor Kalven suggested that "the [broadcasting] industry has under-estimated its legal position and given up too soon." Kalven, *supra* note 21, at 24.

54. See N. DOWLING & G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* (7th ed. 1965).

55. See the two-page note on *Red Lion* in G. GUNTHER & N. DOWLING, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 1225-26 (8th ed. 1970).

provides no cross reference to *Miami Herald* in connection with the discussion of libel.⁵⁶ If the scholars who formulate and organize for study the most pressing issues under the first amendment fail to find any particular significance in broadcast regulation other than as a minor exception to the general rules, it is not surprising that society generally has apparently failed to recognize the broadcast cases as a major departure from first amendment principles.

Furthermore, one of the more striking pieces of evidence of a general perception that broadcasting is somehow "special" is the fact that, during the past half century of regulation, there have been remarkably few attempts to expand any part of the rather extensive regulatory structure into the print media.⁵⁷ Broadcast regulation has been an isolated phenomenon, not a basecamp for incursions into the print media.

A search for explanations as to why the electronic media have been regarded as distinct from the print media should begin with the Supreme Court decisions. After all, the Court in an early case appeared to dismiss the broadcasters' first amendment arguments as being unworthy of serious discussion and officially embraced the physical scarcity rationale.⁵⁸ The *Red Lion* opinion, moreover, is written as if the result were inexorable, and gives no hint that the Court is troubled by its earlier analysis in *NBC*. These decisions undoubtedly reinforced the view that regulation in the "public interest" was somehow appropriate in this "unique" medium. Like the

56. See W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 975-79, 1201-10 (4th ed. 1975). In the ninth edition of the Gunther casebook, published in 1975, *Red Lion* and *CBS* are described in a three-page textual comment and *Tornillo* immediately afterwards in a two-page note. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1230-34 (1975).

57. Although in the past half century there have been numerous proposals advanced for some form of access regulation, see, e.g., 2 Z. CHAFEE, *supra* note 7, at 694-95; Barron *supra* note 8, few seemed to have reached even the stage of serious legislative debate and far fewer have been enacted. A Mississippi right-of-reply statute, Miss. CODE ANN. § 3175 (1942) (now Miss. CODE ANN. § 23-3-35 (1972)), was essentially overturned in *Manasco v. Walley*, 216 Miss. 614, 63 So.2d 91 (1953). In 1969, Nevada repealed its right-of-reply statute, Law of April 14, 1969, ch. 310, § 10, [1969], repealing NEV. REV. STAT. § 200.570 (1963). As already noted, see note 7 *supra*, the Florida statute considered in *Miami Herald* had lain dormant since its enactment in 1913.

In 1970, Congressman Farbstein introduced a bill in the House of Representatives which would have authorized the Federal Communications Commission to apply fairness doctrine concepts to newspapers. H.R. 18927, 91st Cong., 2d Sess. (1970). The bill was never reported out of Committee. In 1973, the Massachusetts Supreme Judicial Court issued an Opinion of the Justices to the Senate, — Mass. —, 298 N.E.2d 829 (1973), in which it advised against the constitutionality of a right-of-reply statute then under consideration in the Massachusetts General Assembly.

58. See *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), discussed in note 21 *supra*.

legerdermain of the pornography decisions to the effect that obscenity is not "speech" and therefore not constitutionally protected,⁵⁹ the Court's reliance on the physical scarcity rationale may have provided an intellectual construct that facilitated ignoring the logical ramifications of the decision.

It would be misleading, however, to attribute too much weight to the Court's role. There is considerable evidence of a widespread societal predisposition to broadcast regulation. For example, although no one has ever questioned the government's decision to take some action to alleviate the problems of interference caused by overcrowding of the spectrum, there were several alternative methods of allocation that would have involved far less governmental intervention into traditional journalistic functions, but which were not seriously considered. Illustratively, Congress could have allocated frequencies on a first-come-first-served basis, relying primarily on chance to determine the composition of the medium.⁶⁰ Or it could have awarded licenses to the highest bidders in an auction, or to winners in a lottery, following the more traditional laissez-faire path of permitting a mixture of chance and market pressures to determine the shape of the medium.⁶¹ Rather than selecting any of these methods, however, Congress opted for the extraordinary choice of regulating a branch of the communications industry in the "public interest."⁶² What is startling about this decision is not the form of public control selected, which was the prevailing response of the time to economic concentration, but the fact that it was adopted so easily in the first amendment context.

Satisfactory explanations for developments such as this are always elusive, but at least several can be suggested. Our society has generally perceived the electronic media as more entertainment-oriented than the print media. Although the Court held in *Joseph Burstyn, Inc. v. Wilson*⁶³ that the first amendment protected non-political speech, that case was not decided until long after broadcast regulation had been instituted and approved in *NBC*. By the

59. See, e.g., *Roth v. United States*, 354 U.S. 476, 481-85 (1957).

60. See 395 U.S. at 390-91.

61. This approach is urged in Coase, *Evaluation of Public Policy Relating to Radio and Television Broadcasting: Social and Economic Issues*, 41 J. LAND & P.U. ECON. 161 (1965). See also, Kalven, *supra* note 21, at 30-32.

62. "The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

63. 343 U.S. 495, 499-502 (1952).

time *Burstyn* was decided, regulations in broadcasting had received widespread acceptance, so that even after that decision our society may have continued to be less sensitive to restrictions on nonpolitical speech.⁶⁴ Further, the different treatment accorded broadcasting may in part be attributable to the unknown nature of the medium at the time regulation was imposed. The features of broadcasting technology have long been embryonic and, consequently, the problems broadcasting *might* present have seemed so unpredictable as to warrant regulation as a precautionary measure. Finally, since the government was virtually compelled to intervene in broadcasting in order to alleviate the problem of signal interference, that justifiable intervention may well have eased the path for more extensive attempts to structure the medium. The brute fact of governmental licensing served to isolate the medium from our tradition of nonregulation. Broadcasting was emphatically *not* the same as the print media, and it may not have been important that the difference did not justify everything done to it.

An explanation for the phenomenon is, however, of secondary importance to the fact of its existence. Crucial here is not that broadcasting is in fact different in principle from the print media, but that it has been believed to be different. This difference in perception goes a long way in explaining the contrasting first amendment protections afforded both branches of the media. In the area of first amendment rights, there has been a perennial concern over the political consequences of oversight, which is reflected in the idea that regulation lets the "camel's nose in the tent."⁶⁵ It has rightly been thought necessary to maintain a firm line against governmental intrusion (the camel's nose) into freedom of speech and press in order to avoid continual disputation over the scope of those freedoms, which may itself snuff out the vitality of those rights. Speaking in the late 1940s of proposals to regulate newspapers, Professor Chafee argued:

The First Amendment embodied a very strong tradition that the government should keep its hands off the press. Every new governmental activity in relation to the communication of news and ideas, however laudable its purpose, tends to undermine this tradition and render further activities easier. "If we do this, why can't we do that?" Appetite grows by what it feeds on. Legal barriers can of course be erected, but it takes constant effort to prevent them from being nibbled away. Therefore, no proposal for governmental action

64. Cf. Kalven, *supra* note 21, at 30.

65. See *Columbia Broadcasting Sys., Inc. v. Democratic Natl. Comm.*, 412 U.S. 94, 154 (Douglas, J., concurring).

should be judged in isolation. It must be considered in relation to other possible state controls over the press, which have not yet been suggested.⁶⁶

Indeed, this prospect of expanding intervention by the state is a troublesome aspect of access regulation, which has many different faces and only a broadly stated purpose that contains no sharp limitations on governmental authority. Even if a decision to allow access regulation would not unleash an irresistible drive for impermissible controls, the substantial public debate that might well be generated over more intrusive regulation could itself serve to chill the independent function of the press.⁶⁷

These concerns have had much greater significance in the context of the print media than in that of the broadcasting industry because of the differences society has perceived in them. It is noteworthy, for example, that Professor Chafee made his argument only in the newspaper context.⁶⁸ While it is true that Chafee thought regulation of broadcasting was constitutionally appropriate because of the physical limitations on access, the fact that regulation has merit does not, of course, render the camel's-nose-in-the-tent argument inapposite in that area. Instead, the real reason for not raising the argument in the broadcasting context is suggested by the reference in the quotation to the longstanding "tradition that the government should keep its hands off the press."

Access regulation in the print media would have immediately signified a pronounced break with traditional first amendment theory. If the Court had, for instance, approved the creation of a Federal Newspaper Commission to administer a fairness doctrine, a spontaneous national debate over the wisdom and implications of the decision would almost certainly have erupted. The constitutional law casebooks would have prominently displayed the decision, supplementing it with text asking probing questions about the holding. What before had seemed unthinkable would then have become thinkable; the free, autonomous press long symbolic of the first

66. 2 Z. CHAFEE, *supra* note 7, at 683. Chafee added at a later point:

Once government becomes active in the communications field, it can go on indefinitely. Zealous officials will keep thinking up new ways for improving the press according to their own ideals. And there is no bright line between encouragement and repression If officials can tell newspapers what to put into their editorial pages, as is proposed for the Free Press Authority, it is only a step to tell them what to leave out.

Id. at 709-10.

67. This is a danger that has found frequent expression in the state-aid-to-religion cases, *see, e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602, 622-24 (1971), but whose relevance is not limited to that branch of the first amendment.

68. *See* note 66 *supra*.

amendment would have been put on a leash.⁶⁹ No longer would the Court be seen as merely sanctioning an aberrant regulatory system limited to a distinct, novel technology of communication, but instead would be seen as pursuing a major policy change with respect to the first amendment.

Thus, the way our society has thought about the two branches of the media has deeply affected the issue of whether to permit access regulation in either area.⁷⁰ Regulation has been more tolerable in the broadcast sector because circumstances there have confined its implications. This is not, it should be noted, an isolated phenomenon. It is rather typical of a general tendency revealed in the case law to permit the government greater leeway in controlling the development of new technologies of communication. An interesting analogy to the broadcast regulation cases are the Supreme Court decisions involving motion pictures.

Treated as a suspicious newcomer to the system of expression, motion pictures were first assigned an inferior status, almost as if there were a first amendment initiation rite. In 1915, the Supreme Court ruled that the medium was not entitled to any first amendment protection,⁷¹ and, although this anomaly was readily apparent, the

69. In his last book, *The Morality of Consent*, the late Alexander Bickel seems to express a similar idea in connection with the *Pentagon Papers* case, *New York Times Co. v. United States*, 413 U.S. 713 (1971). Part of the significance of that case, as Bickel notes, was that it signified the first instance in our history in which the federal government sought "to censor a newspaper by attempting to impose a restraint prior to publication, directly or in litigation." A. BICKEL, *THE MORALITY OF CONSENT* 61 (1975). Thus, even though the Supreme Court ultimately vindicated the right of the *New York Times* to publish the material, the "spell was broken, and in a sense freedom was thus diminished." *Id.* Bickel went on to say: "The conflict and contention by which we extend freedom seem to mark, or at least to threaten, a contraction; and in truth they do, for they endanger an assumed freedom which appeared limitless because its limits were untried. Appearance and reality are nearly one. We extend the legal reality of freedom at some cost in its limitless appearance. And the cost is real." *Id.* Thus, the first perceived break with tradition, and the very fact of having seriously considered the proposition asserted by the government, served to undercut our sense of freedom from this type of governmental activity and to highlight the possibilities for future action for those interested in trying again.

70. This thought may be in part what Professor Emerson had in mind when, after concluding that access regulation in the broadcast media can be justified "out of affirmative concepts of the First Amendment," he stated:

Such a doctrine of First Amendment power and limitation is far-reaching and entails obvious dangers. Applied to the press, for example, it might authorize controls over newspaper coverage that would be highly questionable. In the area of radio and television, however, the government is already heavily involved with the task of preventing electrical interference and solving similar engineering problems. Thus, the regulations have a different substantive and administrative impact and would not necessarily constitute an abridgment of free expression in the same way as comparable regulations in other areas not already heavily weighted by government controls.

T. EMERSON, *supra* note 21, at 665 (emphasis added).

71. *Mutual Film Corp. v. Industrial Comm.*, 236 U.S. 230 (1915). Interpreting a

Court did not lift the yoke of censorship until its 1952 decision in *Joseph Burstyn, Inc. v. Wilson*.⁷² In that case the Court extended first amendment protections to motion pictures, although it was quick to caution that it did not "follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression."⁷³ The constitutional principles that permitted motion pictures to be treated differently were not specified, and the issue of different treatment soon arose in 1961 in *Times Film Corp. v. Chicago*⁷⁴ and again, in 1965, in *Freedman v. Maryland*.⁷⁵ In those cases, the Court sanctioned local laws permitting blatant prior censorship of motion pictures.⁷⁶ Although the Court has never

provision of the Ohio constitution comparable in scope to the first amendment, the Court stated: "It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio constitution, we think, as part of the press of the country or as organs of public opinion." 236 U.S. at 244.

72. 343 U.S. 495 (1952). The Court struck down as an invalid prior restraint a New York statute that authorized the department of education to deny a license to show a film if it was "sacrilegious".

73. 343 U.S. at 503.

74. 365 U.S. 43 (1961).

75. 380 U.S. 51 (1965).

76. At issue in *Times Film* was a Chicago ordinance requiring that prior to exhibition all films had to be submitted to the commissioner of police, who was authorized to refuse a permit if various standards were not met. Certain punishments were provided for showing a motion picture without a permit. The petitioner had refused to submit its film "Don Juan" for prior screening, and the commissioner of police had accordingly refused to issue a permit. Petitioner then sought injunctive relief against enforcement of the ordinance on the ground that it violated the first and fourteenth amendments.

When the case reached the Supreme Court, the majority interpreted the petitioner's claim as an assertion that the state could never, for any reason, restrain any motion picture prior to exhibition. The Court rejected this position noting that in *Near v. Minnesota*, 283 U.S. 697 (1931), it had specifically listed certain areas (including obscenity) as being legitimately within the reach of prior restraints. But the *Times Film* Court seemed to say more, to extend "its blessing," as Chief Justice Warren noted in dissent, 365 U.S. at 65 (Warren, C.J., dissenting), to the procedure embodied by the Chicago ordinance that required all motion pictures to be submitted to a censor before exhibition so that the city could exclude those that were obscene. Aside from a cryptic reference to the need to consider in each case the "capacity for evil" in determining the "permissible scope of community control," the Court made no attempt to distinguish movies from other forms of expression. 365 U.S. at 49-50. At the very end of the opinion, Justice Clark observed simply: "At this time we say no more than this—that we are dealing only with motion pictures and, even as to them, only in the context of the broadside attack presented on this record." 365 U.S. at 50.

The dissent in *Times Film* attacked the majority on the ground that it had failed to explain "why moving pictures should be treated differently than any other form of expression, why moving pictures should be denied the protection against censorship—a form of infringement upon freedom of expression to be especially condemned." 365 U.S. at 50, 76 (Warren, C.J., dissenting), quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952). As to the suggestion that censorship of movies is appro-

explicitly so held, presumably it would be unconstitutional to require that all *books* be submitted to an official body before publication so that obscene material could be censored.⁷⁷ Yet the Court has essentially authorized this procedure for films without, it should be added, articulating why movies are different from books in any important respect.

The film and broadcasting cases seem to demonstrate that new technologies of communication are both new battlegrounds for renewed fighting over old first amendment issues and focal points for reform efforts.⁷⁸ As a result, the actual implementation of first

priate because movies have a special "impact," the dissent argued that there was no evidence of an extraordinary impact and that, even if there were, the first amendment still forbade such prior censorship. 365 U.S. at 77.

In *Freedman v. Maryland* the Court held that the Constitution required various procedural protections in any censorship system that requires prior submission of films. As to why such a system is constitutional at all, the Court stated simply that "[t]he requirement of prior submission to a censor sustained in *Times Film* is consistent with our recognition that films differ from other forms of expression." 380 U.S. at 60-61. Justice Douglas, with whom Justice Black joined, stated merely that "[i]f censors are banned from the publishing business, from the pulpit, from the public platform—as they are—they should be banned from the theatre." 380 U.S. at 62 (Douglas, J., dissenting).

77. *Cf. Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957).

78. The so-called loudspeaker cases constitute another line of decisions that illustrates the Court's efforts to accommodate both the government's regulatory interest in the context of a new technology of communication and traditional first amendment interests. Permeating the cases are issues of access, privacy, and the scope of governmental regulation. In the first such case, *Saia v. New York*, 334 U.S. 558 (1948), the Court held invalid a city ordinance that prohibited the use of sound amplifying equipment unless the user had first obtained permission from the chief of police. Since the ordinance provided no standards for the issuance of permits, the Court said it constituted an unconstitutional prior restraint. Writing for the majority, Justice Douglas said that, while loudspeakers could be regulated as to time, place and manner, they could not be completely banned simply because they could be abused. 334 U.S. at 562. Justice Frankfurter dissented, arguing that the problem of preserving privacy in the face of new technologies which could greatly amplify the human voice was so important and so intractable that local communities should be afforded considerable latitude in devising solutions. 334 U.S. at 566 (Frankfurter, J., dissenting). Justice Jackson also dissented, stating that "society has the right to control, as to place, time and volume, the use of loud-speaking devices for any purpose, provided its regulations are not unduly arbitrary, capricious or discriminatory." 334 U.S. at 569 (Jackson, J., dissenting).

In *Kovacs v. Cooper*, 336 U.S. 77 (1949), although no one opinion commanded a majority of the justices, the court upheld a conviction for violation of an ordinance that forbade the use on public streets of a "sound truck" that emits "loud and raucous noises." Three justices held that the ordinance did not completely prohibit sound trucks but only permissibly barred those that emitted "loud and raucous noises." Justice Frankfurter concurred speaking generally of the idea that freedom of speech has a "preferred position" in the Constitution. At the end of his opinion, however, he objected to the argument that all forms of communication must be treated alike. Referring rather vaguely to movies and broadcasting, he asserted that both media had presented special "problems" that permitted their different first amendment treatment. As for loudspeakers, Justice Frankfurter said that "only a disregard of vital differences between natural speech . . . and the noise of sound trucks would give

amendment theory is much more complex than commonly supposed. The traditional areas of communication, generally the primary focus of attention, retain their purity while new technologies of communication are treated as analytically discrete and are subjected to various social controls.

This first amendment development process is not wholly undesirable. For a dynamic social system in which new problems continually arise, this process of juxtaposing innovation in a new technology of communication against tradition may offer a highly effective and useful mode of adaptation. The opportunity to implement change without the appearance of change can, in this respect, be a disguised blessing brought by the new technologies.

As the movie cases illustrate, however, there are significant risks associated with hidden regulation. Improper regulation, for example, may fester longer because it is not subjected to comprehensive analysis. Further, those persons within the regulated medium can, over time, lose an awareness that their constitutional rights are being violated. If courts and political institutions appear to be insensitive to their first amendment freedoms, and if the public and their

sound trucks the constitutional rights accorded to the unaided human voice." Since they posed greater dangers to the countervailing right of privacy, it was not for the "Court to devise the terms on which sound trucks should be allowed to operate, if at all." 336 U.S. at 96-97 (Frankfurter, J., concurring).

Justice Jackson also filed a concurring opinion, in which he indicated that complete prohibition would be permissible. The only limit he would place on state authority is that it not "censor the contents of the broadcasting." He then added:

I do not agree that, if we sustain regulations or prohibitions of sound trucks, they must therefore be valid if applied to other methods of "communication of ideas." The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself, and all we are dealing with now is the sound truck.

336 U.S. at 47 (Jackson, J., dissenting).

Interpreting the ordinance as completely enjoining the use of loudspeakers, Justice Black wrote a strongly worded dissent in which Justices Douglas and Rutledge joined. 336 U.S. at 98 (Black, J., dissenting). Justice Black said the decision of the majority "would surely not be reached by this Court if such channels of communication as the press, radio, or moving pictures were similarly attacked." 336 U.S. at 102. He opined that such arbitrary treatment of *means* of communication carried the evil of giving "an overpowering influence to views of owners of legally favored instruments of communication." 336 U.S. at 102. Moreover, he appeared to suggest that, since loudspeakers are often used by persons without the money to operate newspapers or publish books, and since such persons often have different views than those who operate more traditional channels of communication, a restriction on the use of loudspeakers may deprive the public of access to important views. 336 U.S. at 103.

The tendency to treat new means of communication as analytically discrete may contain more than a bald refusal to account for differences between new and traditional methods of expression. It may also reflect an unwillingness to restrict everywhere within the system of expression the government's interest in regulation. As new media enter the system, the state's interests in regulation may become more legitimate as the effects of the regulation are more limited.

professional counterparts in other branches of the media consistently fail to support them,⁷⁹ these persons might well become discouraged and less assertive of their rights against the government.⁸⁰ For the Court, therefore, to rely on fictional differences between new and traditional media may ultimately be counterproductive. It serves unnecessarily to isolate important means of communication from our first amendment traditions, and the Court abdicates its important role of instilling in those communicating within the society a full sense of their constitutional rights.

With respect to broadcasting, moreover, the perception of the medium as "different" will eventually fade, as appears to be already happening.⁸¹ When all the communications media finally are perceived as the same in principle, the Court will then be pressed to justify its different treatment. By that time it may be thought appropriate to say what is apparently said about some other anomalies, like the powers of the grand jury or the special status of the insanity defense,⁸² that the explanation is to be found in the legitimacy that time itself can give. But in the case of access regulation in the press, the Court can say much more.

C. *The Rationality of Partial Regulation*

Ultimately, the Court's decisions on the question of access regulation exhibit fundamental good sense. The good sense, however, derives not from the Court's treatment of broadcasting as being somehow special, but rather from its apparent desire to limit the

79. It is interesting that in none of the Supreme Court's three major decisions on broadcast regulation did any newspaper or newspaper association file an amicus curiae brief.

80. Cf. *Kalven*, *supra* note 21, at 15-17.

81. One of the more interesting aspects of the *Red Lion*-*CBS* decisions is the shift in idiom used in discussing the first amendment rights of broadcasters. As described previously, *see* text at notes 17-22 *supra*, *Red Lion* placed heavy emphasis on the right of the public to receive different viewpoints and seemingly little weight on the journalistic freedom of the broadcasters. *See* 395 U.S. at 386-90. The focus was on broadcasters *qua* "licensees" and not *qua* "journalists." In contrast, the *CBS* opinion reflects a significant shift in tone. The Court for the first time referred to broadcasters as a part of the "press," as is illustrated by the following excerpt:

Nor can we accept the Court of Appeals' view that every potential speaker is "the best judge" of what the listening public ought to hear or indeed the best judge of the merits of his or her views. All journalistic tradition and experience is to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspapers or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values.

Columbia Broadcasting Sys., Inc. v. Democratic Natl. Comm., 412 U.S. 94, 124-25 (1973).

82. *See* Henkin, *On Drawing Lines*, 82 HARV. L. REV. 63, 72 (1968).

over-all reach of access regulation. The Court need not, however, isolate the electronic media to achieve this result. Although it is uncertain whether the Court in *Miami Herald* saw it as such, the critical difference between what the Court was asked to do in *Red Lion* and what it was asked to do in *Miami Herald* involved choosing between a partial regulatory system and a universal one. Viewed from that perspective, the Court reached the correct result in both cases.

The central problem in this area results from the complexity of the access issue. The truth of the matter is, as the Court's opinions so plainly, if unintentionally, demonstrate, that there are good first amendment reasons for being both receptive to and wary of access regulation. This dual nature of access legislation suggests the need to limit carefully the intrusiveness of the regulation in order safely to enjoy its remedial benefits. Thus, a proper judicial response is one that will permit the legislature to provide the public with access *somewhere* within the mass media, but not throughout the press. The Court should not, and need not, be forced into an all-or-nothing position on this matter; there is nothing in the first amendment that forbids having the best of both worlds.

Access regulation both responds to constitutional traditions and cuts against them. On the one hand, it helps to make possible the realization of first amendment goals. Unlike attempts to censor types of speech, an access rule is designed to operate in the service of the first amendment. It seeks to neutralize the disparities that impede the proper functioning of the "market-place of ideas," to equalize opportunities within our society to command an audience and thereby to mobilize public opinion, and in that sense to help realize democratic ideals.

That unrestrained private interests can, at times, hamper the free exchange of ideas as seriously as governmental censorship has been apparent with painful clarity within the past half century. Chafee wrote several decades ago about the need to define a new theoretical structure for governmental involvement in the implementation of first amendment rights in response to the problems of private censorship:

[W]hat is the use of telling an unpopular speaker that he will incur no criminal penalties by his proposed address, so long as every hall owner in the city declines to rent him space for his meeting and there are no vacant lots available? There should be municipal auditoriums, schoolhouses out of school hours, church forums, parks in summer, all open to thresh out every question of public importance, with just as few restrictions as possible; for otherwise the subjects that most

need to be discussed will be the very subjects that will be ruled out as unsuitable for discussion.

We must do more than remove the discouragements to open discussion. We must exert ourselves to supply active encouragements.⁸³

Chafee's articulation of the seeds of an "affirmative" theory of freedom of speech constituted an important qualification of the thinking of laissez-faire theorists such as John Stuart Mill and John Milton. Many commentators since Chafee have elaborated on his idea.⁸⁴ The debate that has been generated unquestionably involves the most vital first amendment issues of our time.

The Supreme Court has, through its actions, occasionally demonstrated that it recognizes the serious problems posed by unregulated private interests operating in areas that affect the first amendment. In a seminal decision in *Associated Press v. United States*,⁸⁵ the Court approved a governmental order directing a national wire service to make its news available on a nondiscriminatory basis, stating that "[f]reedom of the press from governmental interference under the first amendment does not sanction repression of that freedom by private interests."⁸⁶ In another well-known line of cases the Court held that a private company town and a shopping center were prohibited under the first amendment from excluding certain speech that the private owners would have preferred to censor.⁸⁷ These decisions, together with *Red Lion*, outline a still tentative approach to removing the inequalities in speech opportunities.⁸⁸

Of all the efforts thus far to restructure private arrangements that impinge on the "market-place of ideas," access regulation represents the most direct assault, and, consequently, the most dangerous.⁸⁹ Al-

83. Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 559 (1941).

84. See T. EMERSON, *supra* note 21, at ch. xvii; Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227 (1966).

85. 326 U.S. 1 (1945).

86. 326 U.S. at 20.

87. See *Marsh v. Alabama*, 326 U.S. 501 (1946); *Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). But see *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

88. An interesting response to the problem of access in the mass media has been the noticeable solicitude for minor modes of communication. Judicial opinions and scholarly commentary have emphasized the need for protection of these methods of communication precisely because of the restricted nature of the press. See, e.g., *Martin v. Struthers*, 319 U.S. 141, 146 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people"); *Kovacs v. Cooper*, 336 U.S. 77, 98 (1949) (Black, J., dissenting). See also Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 30; Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 233-34. Though important, this is hardly an adequate response to the problem of concentration in the mass media.

89. Other major attempts at reform have come primarily in the area of antitrust law. The Newspaper Preservation Act, Pub. L. No. 91-353, 84 Stat. 466 (1970) (co-

though its aims conform to those of the first amendment, the methods of access regulation constitute a significant departure from our traditional constitutional notions concerning the need to maintain a distance between the government and the press, especially on matters directly touching news content. Access regulation carries the greatest potential for altering the press as we have known it and for exposing us to grave risks.

In general, access regulation may have three adverse consequences for the marketplace of ideas. The first is a commonly identified cost of access regulation: It may have a depressing effect on journalistic motivation to engage in discourse on social issues.⁹⁰ This cost is presumably greater with some forms of access regulation than with others. The chilling effect associated with the right-of-reply rules is likely much greater than that associated with the requirement that editors publish all advertisements on a nondiscriminatory basis. Even where the chilling effect is thought to be a problem, however, no data exist as to the extent to which the regulation does, in fact, have an inhibiting effect. Nevertheless, in those cases where a significant chilling effect may predictably occur, there is cause for concern, given our general commitment to the idea that debate is most likely to be fruitful if it is "uninhibited, robust, and wide-open."⁹¹ The prospect that some regulated editors will choose to forego coverage of some political discussion because of reply requirements need not necessitate rejection of access regulation; its benefits may still outweigh this cost. Such a cost, however, remains a matter of concern, and should be minimized as much as possible.

A second general concern associated with access regulation involves the risk that the administrative machinery required to implement it will be used to force the press into some official line and

dified at 15 U.S.C. §§ 1801-1804 (1970)), is a recent example of the use of the anti-trust laws to foster opportunities for debate within the press. However, it also represents a recognition that the antitrust laws themselves are not likely to achieve more diversity of outlets since the high economies of scale in the newspaper industry seem to lead to the creation of natural monopolies. See B. SCHMIDT, *supra* note 3, at 51-54.

On a private level one might note the recent formation of the National News Council. The Council is a mediating organization with no powers of enforcement. For a description of its operation and an analysis of the effectiveness of this and other press councils, see Ritter & Leibowitz, *Press Councils: The Answer to Our First Amendment Dilemma*, 1974 DUKE L.J. 845.

90. For an evaluation of the chilling effect of access regulation, see Lange, *supra* note 5, at 70-71; Kalven, *supra* note 21, at 19-23; Robinson, *supra* note 30, at 136-40. It will be recalled that the Court in *Red Lion* dismissed the broadcaster's chilling effect argument as speculative, while in *Miami Herald* it relied on the argument in striking down the regulation. See text at notes 11-19 *supra*.

91. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

will undermine its role as a critic and antagonist of government. Although neither *Red Lion* nor *Miami Herald* discussed this risk, the possibility of official misbehavior has been a traditional reason for withholding approval of governmental schemes to "improve" the press.⁹² It is a consideration that reflects the sum of our experience and should not be lightly disregarded. Evidence that this risk is still vital may, regrettably, be found in an examination of our recent upheaval in presidential politics.

In the course of the revelations about Watergate, it became known that the executive branch, angered by unflattering remarks, criticisms and disclosures of government secrets, embarked on an extensive campaign to harass the press. A substantial part of the attack apparently involved using administrative machinery to apply pressure on journalists.⁹³ There were also serious allegations that the executive branch had sought to apply pressure directly on the *Washington Post* by creating difficulties for the *Post's* subsidiary radio stations with the Federal Communications Commission.⁹⁴ If there is a Watergate lesson for the first amendment, therefore, it is that we should continue to be extremely wary of making available official

92. See, e.g., 2 Z. CHAFEE, *supra* note 7, at 476-77.

93. One of the impeachment charges leveled by the House Judiciary Committee was that officials of the Nixon administration had induced, or had suggested inducing, tax audits of troublesome members of the media. See CONGRESSIONAL INFORMATION SERVICE (1974), H521-34, at 16, 18, 21.

The willingness of the administration to employ federal machinery to silence the press was most vividly reflected in the events surrounding the creation of the "enemy list." John Dean, then the President's legal counsel, stated in one memorandum: "This memorandum addresses the matter of how we can maximize the fact of our incumbency in dealing with persons known to be active in their opposition to our administration. Stated a bit more bluntly—how we can use the available federal machinery to screw our political enemies." CONGRESSIONAL INFORMATION SERVICE (1973), S961-4, at 1689. Dean went on to suggest that "grant availability, federal contracts, litigation, prosecution, etc." should all be considered in determining how most effectively to "screw" opponents. *Id.* The enemy list as compiled contained a total of 57 reporters, editors, columnists and television commentators. *Id.* at 1716-18. The *Washington Post*, the *New York Times* and the *St. Louis Post Dispatch* were among the institutions included. *Id.* at 1716. See also *Washington Post*, Dec. 3, 1973, section A, at 24, col. 4 (documents disclosed by Senator Lowell Weicker); THE WHITE HOUSE TRANSCRIPTS 57-58, 63, 404, 782-84 (Bantam Books, Inc. 1974).

94. In January 1973, the Associated Press and United Press International reported that the broadcast licenses of two Florida television stations, both owned by the *Washington Post*, were being challenged before the Federal Communications Commission by a group which included long-time friends and political associates of President Nixon. *N.Y. Times*, Jan. 4, 1973, at 21, col. 1; *Washington Post*, Jan. 3, 1973, section A, at 6, col. 1. It was subsequently revealed that Glenn J. Sedam, Jr., general counsel to the Committee for the Re-Election of the President, had advised some of the Nixon associates involved in the challenges. *Washington Post*, Jan. 9, 1973, section A, at 6, col. 1. Only the *Post's* two stations, out of 36 stations in the state, had their licenses contested. It should be noted, however, that the administration and all the principals involved in the challenges denied any political motivation. *Washington Post*, Jan. 9, 1973, section A, at 6, col. 1.

machinery for the regulation of the press. Such a regulatory structure would stand as a constant temptation to governmental officials—a source of leverage with which to compel obedience within the press and, in more subtle ways, to manipulate the content of public debate.

The third potential adverse consequence of access regulation is that it may result in an escalation of regulation, the camel's-nose-in-the-tent phenomena mentioned earlier.⁹⁵ This criticism is one of those stock arguments that suffers badly from overuse. It is easy to dismiss the claim because it is advanced so often in circumstances where it carries no conviction. With respect to access regulation, however, the argument has powerful force and should not go unheeded.

The problem is not simply that regulation will induce irresistible pressure for censorship. The dangers are more subtle and complicated. Access regulation comes in a variety of shapes and sizes. Some forms, like a vigorously enforced fairness doctrine, may lead to utter blandness of content and in this way may permit official manipulation of the news. In addition, it is virtually impossible for the Court to articulate in advance unambiguous standards. Experience with a particular regulation will often be necessary to judge its desirability and constitutionality. It is important to know, for example, how frequently the government will be drawn into conflict with the editors,⁹⁶ what financial burdens the administrative procedures will impose on those that are regulated, and whether the administering officials will be prone to misconduct or will exhibit a healthy respect for first amendment freedoms.⁹⁷

By sanctioning the concept of access regulation, the Court can expect administrative experimentation with the various types of regulation. And since clear guidelines cannot be established, there may be constant pressure to expand the regulatory power into impermissible areas. The clamour for greater regulation may itself be used as a weapon to bend the press into line. If what turns out to be improper regulation is imposed, irremediable harm may have already occurred before the Court acts. Similarly, the difficulties in assessing the future consequences of the regulation may lead the

95. See text at note 65 *supra*.

96. Such data has been available with respect to broadcast regulation. We know, for example, that in fiscal 1973, the Commission received about 2,400 fairness doctrine complaints and forwarded 94 to broadcasters for comment. 39 Fed. Reg. 26,375 (1974).

97. For an indication that consideration of the type of person likely to assume the administrative role is relevant here, see *Times Film Corp. v. Chicago*, 365 U.S. 43, 69-73 (Warren, C.J., dissenting). See also J. MILTON, *AREOPAGITICA* 210 (3 Harvard Classics (1909)).

Court to sanction conduct that is ultimately very harmful.⁹⁸ In both instances, it must be remembered that "[l]egal experiments, once started, cannot be stopped the moment they show signs of working badly."⁹⁹

Viewed in its entirety, therefore, access regulation is both desirable and dangerous. That it raises a constitutional problem of enormous difficulty is reflected in the schizophrenic nature of *Red Lion* and *Miami Herald*. In light of the double-edged character of access regulation, the Court's appropriate response is to affirm congressional authority to implement only a *partial* regulatory scheme. Only with this approach, with a major branch of the press remaining free of regulation, will the costs and risks of regulation be held at an acceptable level. Or, put another way, only under such a system can we afford to allow the degree of governmental regulation that is necessary to realize the objectives of public access.

One advantage of a partial regulatory system is that the unregulated sector provides an effective check against each of the costs of regulation. A partial scheme offers some assurance that information that might not be disseminated by the regulated sector of the press will nevertheless be published by the unregulated press. If, for example, a local broadcast station chooses not to cover a debate between two prominent mayoral candidates because of equal time obligations, then the public will still be informed of the event by the local newspaper. Second, a partial scheme offers some assurance that governmental use of the regulatory authority to bludgeon the press into an official line will not suppress the truth. If, for example, the *Washington Post* had curtailed its Watergate investigations to ward off what it might reasonably have perceived to be governmental pressure to have the licenses of its subsidiary radio stations revoked, other newspapers free of governmental entanglements, such as the

98. As one commentator has argued:

Any widespread governmental action is likely to produce unexpected results. England, early in the eighteenth century, sought to strengthen her long-standing alliance with Portugal by admitting Portuguese wines at a very low rate of duty. This encouraged the drinking of port rather than French claret. The result was to afflict two centuries of Englishmen with gout Similar surprises can take place when the government concerns itself with communications industries.

2 Z. CHAFEE, *supra* note 7, at 475. Perhaps an example of an unforeseen effect of broadcast regulation is the apparent political abuse surrounding the fairness doctrine. See F. Friendly, *What's Fair on the Air?* N.Y. Times Magazine, March 30, 1975, at 11. Professor Friendly charges, *inter alia*, that during the early 1960s officers of the Democratic National Committee organized and funded "private" organizations that would demand of radio and television stations an opportunity to reply to any coverage of right-wing positions in order to discourage media coverage of anti-administration viewpoints.

99. 2 Z. CHAFEE, *supra* note 7, at 699-700.

New York Times, would still have continued the investigation. Finally, such a system gives some assurance that the pressures for and effects of harmful regulation will be cushioned. If, for example, a Vice-President were to urge much more vigorous access regulation in order to ward off criticism of the President, and as a result the regulated sector were to tone down its criticism, the unregulated press would remain active.

Restricting regulation to only a part of the press, however, offers more than a check against these costs. It provides, again through the presence of the unregulated media, a beneficial tension within the system. The unregulated sector can operate to minimize the three costs of regulation. Consider, for example, the chilling effect problem. The publication of news in the unregulated press serves as a competitive prod to the regulated press to publish what it might otherwise omit.¹⁰⁰ Thus, broadcasters may initially have been reluctant to cover Watergate events because of fears of official reprisals and access obligations, but a decision not to cover the story would have been impossible once the print media began exploiting it.¹⁰¹

The most significant aspect of a partial regulatory scheme, however, is that it preserves a benchmark—an important link with our constitutional traditions as the Court permits experimentation with regulation. The continuing link with traditional first amendment theory conveys the message that old principles have not been abandoned, and it forces every departure to be more carefully scrutinized and justified. The message is one of adjustment rather than wholesale revision.¹⁰²

One of the more interesting features of our experience with broadcast regulation has been the absence of egregious abuses of power by the FCC. The Commission has, on the whole, been extraordinarily circumspect in the exercise of its powers.¹⁰³ It is

100. Cf. E. EPSTEIN, *supra* note 39, at 150.

101. It is also likely that the principles represented by the regulations themselves will have an effect throughout the entire media system. Representing the public's pronouncement of proper journalistic behavior, the principles may over time filter into the unregulated sphere, in much the same way that we occasionally see the constitutional due process requirements voluntarily adopted by private institutions. Thus, under a partial regulatory system a fruitful symbiotic relationship may be expected to develop.

102. The process resembles that which is observed in other areas of constitutional law, for example, the applicability of criminal procedure rules to the juvenile justice system. Cf. *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967).

103. 1 Z. CHAFEE, *supra* note 7, at 11-12; 2 *id.* at 476-77; Kalven, *supra* note 21, at 18, 19-20. The only area, it seems, where the Commission can perhaps be charged with having seriously ignored important free speech interests is indecent

reasonable to assume that this self-restraint is explained in large part by the constant juxtaposition of the autonomous print media, representing our continued respect for the ideal of a free press, against the regulated broadcasting media. By preserving the unregulated print media, the benchmark against which the reform must continually be measured, even if not explicitly, the Court has furnished a built-in restraint against excesses in regulation. Those representing the interests of broadcasters have been able to point to the practices of the print media as concrete illustrations of traditional constitutional principles rather than to some abstract principle of freedom of the press, thus making more explicit any departure from nonregulation. The effect of this process can be readily observed in more recent court decisions, where frequent references to the print media demonstrate the force of the newspaper analogy.¹⁰⁴

In an article on broadcast regulation written in 1967, Professor Kalven observed that "[l]aw . . . is determined by a choice between competing analogies."¹⁰⁵ What had been "sorely needed" in the broadcasting area was "the competing analogy to set against the claims for control."¹⁰⁶ There had never been "a precedent setting the *outer boundaries* of [FCC] control"¹⁰⁷ The absence of an explicit limit on Commission authority has been unfortunate, but the problem has been less significant than it otherwise would be precisely because the unregulated print media has provided a "competing analogy."

It is from this perspective that the *Miami Herald* decision begins to make some sense. On the surface, the decision seems singularly inattentive to the parallel broadcasting cases, yet in fact it speaks directly to them. *Red Lion* had given the impression that editorial rights were to be subordinated to the "public's right to hear." It spawned a political and legal movement, spearheaded by Professor Jerome Barron,¹⁰⁸ plaintiff's counsel in *Miami Herald*, for more

speech. See, e.g., *In re Pacifica Foundation*, 36 F.C.C. 147 (1964); *In re WUHY-FM Eastern Educ. Radio*, 24 F.C.C.2d 408 (1970). See Kalven, *supra* note 21, at 18.

104. See, e.g., *Columbia Broadcasting Sys., Inc. v. Democratic Natl. Comm.*, 412 U.S. 94 (1973); *National Broadcasting Co. v. FCC*, 516 F.2d 1101 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976).

105. Kalven, *supra* note 21, at 38.

106. *Id.*

107. *Id.* at 37.

108. See Barron, *supra* note 8; Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1969); Barron, *Access—The Only Choice for the Media?*, 48 TEX. L. REV. 766 (1970). Other articles on access are collected in Lange, *supra* note 5, at 2 n.5.

The movement for a first amendment right of access to the broadcast media has

extensive regulation. In its reaffirmation of fundamental first amendment principles, the *Miami Herald* Court's opinion urges caution and restraint, and sharply limits regulatory reform. To be sure, the opinion represents a lowpoint in judicial craftsmanship, but it is nevertheless explicable.

It must be admitted that the proposed partial theory of regulation is unique in its specific formulation. Nowhere else has the Court interpreted the Constitution to allow Congress such a discretionary regulatory role. The theory is, however, no less valid for this reason. It can satisfy the test of legitimacy applied to new constitutional pronouncements. As discussed above, the Court is able to present reasoned arguments for both allowing regulation and restricting it as a way to further the purposes and values underlying the first amendment.

It has long been recognized that the Constitution is not a static instrument. Old constitutional principles are continually being discarded or revised as they are discovered to be ineffective in protecting fundamental values or to hamstring unduly the achievement of legitimate social aims; new principles are continually being devised to meet the exigencies of an ever-changing reality. A part of this process, as the access question demonstrates, involves deciding to what extent new principles are to overtake traditional approaches. It is a major part of the Court's most vital function of carrying forward and reinterpreting constitutional values in light of changed circumstances.

The theory of partial regulation mandates, in effect, a system in which the burdens of regulation will be allocated unequally among the various institutions of the press. Those associated with the institution that Congress chooses to regulate may claim that it is unfair for them to bear the burdens of regulation when their similarly situated counterparts do not. Their claim would be that the scheme of classification is "underinclusive." This claim of unequal treatment may be a factor to be considered in deciding whether to mandate a partial system, but it ought not be determinative for several reasons. First, courts and commentators generally give greater constitutional leeway to an underinclusive rather than an "overinclusive" approach to a general problem, since in underinclusive classifications "all who are included in the class are at least tainted by the mischief at which the law aims . . . while over-inclusive classifications reach out to the innocent bystander, the hapless

been arrested by the Court's decision in *Columbia Broadcasting Sys., Inc. v. Democratic Natl. Comm.*, 412 U.S. 94 (1973).

victim of circumstances or association.”¹⁰⁹ Second, the trait that defines the class would not be the content of speech and it would not reflect an official animus against a particular group of people because it would be directed at *institutions* and not individuals. That is, the classifying trait would be the neutral factor of technology, and not a suspect factor such as race. This means that those individuals indirectly affected would be able to shift to the unregulated media and escape the burden imposed should they find it offensive, and that the opportunity for government to pursue solely political or discriminatory purposes under the guise of the first amendment is minimized.

In seeking to advance first amendment goals, the Court should not be precluded from deciding on a rational basis to limit congressional powers of regulation. There may be more than one claim to “equality” to be considered. Those persons excluded from public debate because of private ownership also have a claim to “equality” in the sense of obtaining an equal opportunity to speak.¹¹⁰ If a full restructuring of the press to accommodate those claims is too dangerous, then the Court must balance the interests of those excluded from the media against the interests of those members of the press whom Congress will ultimately select to bear the burden of regulation in a partial system. Phrased somewhat differently, it is the *first amendment itself* that justifies this differential treatment of mass communication technologies.

The analysis of *Red Lion* and *Miami Herald*, therefore, demonstrates the need to maintain a partial regulatory structure *for its own sake*. What the Court has never fully appreciated is that the very similarity of the two major branches of the mass media provides a rationale for treating them differently. By permitting different treatment of the two institutions, the Court can facilitate realization of the benefits of two distinct constitutional values, both of which ought to be fostered: access in a highly concentrated press and minimal governmental intervention. Neither side of the access controversy emerges victorious. The Court has imposed a compromise—a compromise, however, not based on notions of expediency, but rather on a reasoned, and principled, accommodation of competing first amendment values.

There is, it is true, something to be said in favor of limiting legis-

109. See Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 351 (1949).

110. See Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 43-52 (1975).

lative experimentation with access to the electronic media and precluding Congress from choosing any segment of the mass media to regulate. This is a product of the different treatment long accorded broadcasting: What seems possible in broadcasting seems unthinkable for newspapers. It is, however, unwise to maintain separate traditions for separate branches of the media; it is, in the end, counterproductive to first amendment interests. Instead, the Court ought to acknowledge broadcasters as full-fledged participants in our first amendment traditions and yet permit Congress to engage in *some* experimentation with press freedom to facilitate public access, allowing Congress to choose the medium to be regulated. This means, of course, that eventually the legislative branch may shift the target of its regulatory scheme to other segments of the media, provided it abandons its earlier target. Thus, it ought theoretically to be possible for Congress to abandon its regulation of the electronic media and choose instead to provide access within the confines of the newspaper industry. The extent to which it ought to be able to regulate the print media is problematical. The answer to that question, however, must ultimately depend on a contemporary evaluation of the factors that justify partial regulation.

III. A CONSTITUTIONAL ASSESSMENT OF CABLE TECHNOLOGY

*Madame Sosotris, famous clairvoyante, had a bad cold . . .*¹¹¹

An interpretation of the first amendment that permits Congress to impose access regulation, but only within a limited segment of the press, has important implications for the emerging technology of cable television. It is frequently argued that, since *Red Lion* predicated its approval of access regulation upon the limited channel space of the electromagnetic spectrum, the shift to the virtually unbounded channel capacity of coaxial cables will eliminate the constitutional justification for regulation.¹¹² This argument, however,

111. T.S. Eliot, *The Waste Land*, THE DIAL (Nov. 1922).

112. See, e.g., Note, *Cable Television and the First Amendment*, 71 COLUM. L. REV. 1008 (1971); Note, *The Proposed Cable Communications Act of 1975: A Recommendation for Comprehensive Regulation*, 1975 DUKE L.J. 93, 112-13.

Similar thinking appears to underlie the 1974 report of the Cabinet Committee on Cable Communications, which recommended the immediate end of access regulation with respect to cablecasting. THE CABINET COMMITTEE ON CABLE COMMUNICATIONS, REPORT TO THE PRESIDENT 37-38 (1974). The Office of Telecommunications Policy (OTP) has prepared legislation embodying this and other policies for submission to Congress. Section 401 of the Proposed Act provides as follows:

No executive agency of the United States . . . and no State or political subdivision or agency thereof . . . shall:

(a) require or prohibit program originations by a cable operator or channel programmer, or impose upon such operator or programmer any restrictions or

misconceives the scarcity rationale as the true, or at least the only, explanation for the disparate treatment of the electronic media. A theory of partial regulation better explains *Red Lion* and *Miami Herald*, and that thesis would permit access regulation within television even if there were an unlimited number of channels.

That is not to say that the cable technology may not affect the existing structure of the television industry, and hence congressional perception of the urgency of regulation. By increasing the available number of channels, thereby easing the costs of entry into the television market, cable may create a much more atomized system of programming with each channel claiming only a relatively small portion of the viewing audience.¹¹³ It is even possible that the increased competition could result in the breakdown of the presently gargantuan networks.

It is not at all certain that this will be the result. Indeed there are good reasons for thinking that the present structure will remain largely unchanged for the foreseeable future.¹¹⁴ In any case, it is virtually impossible at this time to predict precisely what transformation, if any, will occur, because it is difficult to determine what economic advantages present broadcasters will have acquired, the extent to which audience tastes will change or remain the same, and the interplay of a host of other factors that will undoubtedly play a role.

The potential of cable television to increase substantially the number of competing television outlets, however, should not change

obligations affecting the content of such program originations, including rights of response by any person, opportunities for appearances by candidates for public office, or requirements for balance and objectivity

For commentary on the proposed bill, see Note, 1975 DUKE L.J. 93, *supra*. The present status of the bill is uncertain. It has thus far failed to pass the executive clearance process, and the OTP is studying various objections raised against the bill. It is unclear what the change in administration portends for the proposed legislation.

Instead of using the circumscribed electromagnetic spectrum as a means of transmitting television signals, cable television relies on coaxial cables laid underground or strung aboveground like telephone wires. No physical law limits the number of cables that can be connected. Thus, while the available frequencies in the VHF portion of the spectrum permit only 12 channels, cable can carry as many as 80 channels. Through interconnection devices and the use of satellites, the potential exists for a vastly expanded national and local network of television channels. Broadcasting as a mode of transmission could become obsolete. For a detailed discussion of the nature and uses of coaxial cable, see THE SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE: THE TELEVISION OF ABUNDANCE 11-16 (1971) (hereinafter SLOAN REPORT). It is important to realize, however, that cable has not yet developed to this stage. Cable systems presently reach only approximately 12.5 per cent of the nation's television households and offer between 8 and 12 channels. See BROADCASTING, CABLE SOURCEBOOK 1975, at 5.

113. See, e.g., R. SMITH, THE WIRED NATION (1972).

114. See, e.g., SLOAN REPORT 78-81, 118, 169; LaPierre, *Cable Television and the Promise of Programming Diversity*, 42 FORDHAM L. REV. 25, 119-24 (1973).

the constitutional determination permitting Congress to impose access regulation on television. Even if eventually there are ten channels more or less evenly dividing the nation's audience, a rather remote possibility, Congress ought still to be permitted to provide that the opportunity to reach the television audience will not depend entirely on private ownership. As is true now, the government should be able in one forum to balance the freedom of press interests of those owning established channels of communication against the interests of those effectively excluded from major avenues of communication.

Nevertheless, cable technology does mean that a *legislative* crossroad has been reached on the matter of access regulation. The emergence of cable makes more possible than ever before reliance on the interplay of private interests to assure an effective marketplace of ideas. As a result, cable offers a new context in which to rethink questions relating to the scope and types of access regulation. It may be thought wiser, for example, to limit regulation to selected mass audience channels than to impose access regulation throughout television. Certain types of access regulation, moreover, may be considered either more or less appropriate than they were previously. Furthermore, the desirability of avoiding certain forms of access regulation that might affect the development of cable may be affirmed. A broad application of the fairness doctrine, for example, could inhibit the entry of programmers who desired to program with a strong ideological bias aimed at a limited and politically homogeneous audience. While this has been a cost of regulation in the past, its dimensions have been much more confined because the number of potential entrants so affected was much smaller.

Cable, therefore, raises important questions for the current regulatory scheme. Currently, it is the FCC that provides answers to these questions. The Commission has chosen to impose access regulation within a cable, although thus far only on channels originating with the cable owner.¹¹⁵ Whether it will choose to apply access

115. In 1972, the Commission after several years of study announced a highly elaborate and intricate body of regulations covering cable television reflecting a shift in Commission attitude from containment of cable to mild encouragement. FCC, CABLE TELEVISION REPORT AND ORDER ON RULES AND REGULATIONS RELATIVE TO CATV SYSTEMS, 36 F.C.C.2d 143 (1972), *stays denied*, 34 F.C.C.2d 165, 170, 172, 174, 176, 178, 180, *reconsideration denied*, 36 F.C.C.2d 326. See LaPierre, *supra* note 114, at 87.

The most significant provisions are those that relate to the potential expansion of the total number of television channels available. Under the present regulations, cable systems must have a minimum capacity of 20 channels. 47 C.F.R. § 76.251(a)(1) (1975). For each broadcast signal carried, the operator must make available one channel for nonbroadcast programming. 47 C.F.R. 76.251(a)(2) (1975). Of the

regulation to leased channels operated by independent programmers is still uncertain.

The question likely to confront the Court in the near future is whether the Commission has the statutory authority under the Communications Act of 1934 to impose access regulation on cable television. When that case does arise, the Court ought to rule against the Commission for at least two reasons. First, given the potential of cable technology to alter significantly the television medium, together with the important first amendment interests at stake in the access question, the Court should find that the imposition of access regulation on cable is beyond the scope of the Communications Act. The access problems that brought about the remedial efforts of the 1934 Act are not comparable to those in cable technology. Second, the history of the Commission's treatment of cable does not inspire confidence in its judgments in this area. There is considerable evidence that the Commission has been more concerned with protecting the economic interests of conventional broadcasters than with fully exploiting the resources of cable technology.¹¹⁶ Thus, the Court ought to require Congress to make the decision on access in the first instance.

This approach to the question of access regulation in cable is not precluded by the Court's decision on two occasions upholding the authority of the Commission under the Communications Act to impose various regulations on cable. The question whether the Commission has the power to regulate cable at all is separate from the question whether it has the authority to issue a particular rule. For our purposes, it is significant that neither of the Court's cable decisions involved an issue as important from a first amendment perspective as that of access regulation. Further, in both cases the Court seemed to recognize the need for congressional reevaluation of the need for regulating cable. In *United States v. Southwestern Cable Co.*,¹¹⁷ its first cable decision, the Court approved FCC

latter channels, one each must be available for use by the public on a first-come first-served basis, 47 C.F.R. § 76.251(a)(4) (1975), by educational authorities, 47 C.F.R. § 76.251(a)(5) (1975), and by local government, 47 C.F.R. § 76.251(a)(6) (1975), and the remainder must be open for lease on a common carrier basis to independent programmers, 47 C.F.R. § 76.251(a)(7) (1975). The rules further provide that the equal time and fairness doctrine rules are applicable to all origination cablecasts. 47 C.F.R. §§ 76.205, 76.209 (1975). Other limitations relating to lotteries, obscenity, and sponsorship identification, which are regularly imposed on broadcasters, are also extended to cablecasters. 47 C.F.R. §§ 76.213, 76.215, 76.221 (1975).

The Commission's future regulatory role with respect to cable is, apparently, still a matter of considerable doubt within the agency. See Price, *Requiem for the Wired Nation: Cable Rulemaking at the F.C.C.*, 61 VA. L. REV. 541, 544 (1975).

116. See, e.g., LaPierre, *supra* note 114.

117. 392 U.S. 157 (1968).

action under the Commission's "local carriage" rule,¹¹⁸ which forbade certain cable systems from importing broadcast signals without Commission approval, and thereby served to protect the market of local broadcasters. The Court, speaking of a need to provide for the "orderly development" of an appropriate system of local television broadcasting,¹¹⁹ upheld the rule as "reasonably ancillary to the effective performance of the Commission's responsibilities for the regulation of television broadcasting."¹²⁰

In a subsequent decision in *United States v. Midwest Video Corp.*,¹²¹ the Court considered the Commission's "program origination" rule requiring nonbroadcast programming on some cable systems. The rule provided that "no CATV [cable] system having 3,500 or more subscribers shall carry the signal of any television broadcast station unless the system also operates to a significant extent as a local outlet by cablecasting and has available facilities for local production and presentation of programs other than automated services."¹²² The Court was deeply divided on the issue of the statutory validity of the rule. In finding the regulation consistent with the "public interest" and thus within the power of the Commission, Justice Brennan, representing a plurality of four justices, said:

The effect of the regulation, after all, is to assure that in the retransmission of broadcast signals viewers are provided suitably diversified programming—the same objective underlying regulations sustained in *National Broadcasting Co. v. United States* . . . , as well as the local-carriage rule reviewed in *Southwestern* and subsequently upheld.¹²³

A dissenting opinion joined by four justices argued that the regulation was invalid on the ground that the Communications Act nowhere accorded the FCC the power to compel anyone "to enter the broadcasting field."¹²⁴ With obvious reluctance, Chief Justice Burger cast the deciding vote for the Commission but observed that the

118. The regulation as quoted in the Court's opinion provided that [n]o CATV system operating in a community within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing approved by the Commission that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. 392 U.S. 157, 159 n.2.

119. 392 U.S. at 177.

120. 392 U.S. at 178.

121. 406 U.S. 649 (1972).

122. 47 C.F.R. § 74.1111(a), revised as 47 C.F.R. § 76.201(a) (1973). This regulation was suspended for most of its life and then abandoned by the Commission in 1974. 39 Fed. Reg. 43,302 (1974).

123. 406 U.S. at 649, 669.

124. 406 U.S. at 677, 679 (Douglas, J., dissenting).

"almost explosive development of CATV suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development, so that the basic policies are considered by Congress and not left entirely to the Commission and the courts."¹²⁵

As the Commission seeks to extend its authority over cable television, the Court ought to be sensitive to the need for congressional guidance in an area that so plainly involves first amendment interests.¹²⁶ The suggestion of Chief Justice Burger should be the basis for decision. A considered legislative judgment on matters relating to access regulation in cable television is important and overdue, but it should also be recognized that this is an appropriate juncture to pause and reassess the costs and benefits of the entire experiment.

Most importantly, perhaps cable offers the Court an appropriate occasion for discarding the shibboleth of the scarcity rationale. The Court should begin the process of defining a rationale for regulation that recognizes the limited power of Congress to impose access regulation within the mass media. At the same time the Court can openly recognize the link between broadcasting and our constitutional traditions and begin to create a heightened sensitivity to the first amendment rights of broadcasters.

IV. CONCLUSION

What appears on the surface to be the paradox of *Red Lion* and *Miami Herald* turns out on close inspection to be a rationally defensible regime. The different treatment accorded the broadcasting and print media is an especially intriguing illustration of the implementation of new first amendment principles. The substance of the constitutional solution that has been devised, or, more accurately, to which the decisions point, is both acceptable and sound. In the end, it is the first amendment itself that requires different treatment of these institutions, accommodating both the will of the legislature to participate in the realization of first amendment goals and the role of the Court as the ultimate guarantor of those goals. The impact of a new technology like cable is not so much that it alters the accommodation, but that it permits the Court to take a fresh and unblinking view of it.

125. 406 U.S. at 676 (Burger, C.J., concurring).

126. Cf. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

FREEDOM OF EXPRESSION AND CATEGORIES OF EXPRESSION*

*T.M. Scanlon, Jr.***

I. INTRODUCTION

Freedom of expression, as a philosophical problem, is an instance of a more general problem about the nature and status of rights. Rights purport to place limits on what individuals or the state may do, and the sacrifices they entail are in some cases significant. Thus, for example, freedom of expression becomes controversial when expression appears to threaten important individual interests in a case like the Skokie affair, or to threaten some important national interest such as the ability to raise an army. The general problem is, if rights place limits on what can be done even for good reasons, what is the justification for these limits?

A second philosophical problem is how we decide what these limits are. Rights appear to be something we can reason about, and this reasoning process does not appear to be merely a calculation of consequences. In many cases, we seem to decide whether a given policy infringes freedom of expression simply by consulting our conception of what this right entails. And while there are areas of controversy, there is a wide range of cases in which we all seem to arrive at the same answer. But I doubt that any of us could write out a brief, non-circular definition of freedom of expression whose mechanical application to these clear cases would yield the answers on which we all agree. In what, then, does our agreement consist?

My aim in this paper is to present an account of freedom of expression that provides at least a few answers to these general questions. I will also address a more specific question about freedom of expression itself. What importance should a theory of freedom of expression assign to categories of expression such as political speech, commercial speech, libel and pornography? These categories appear to play an important role in informal thought about the subject. It seems central to the controversy about the Skokie case, for example, that the proposed ordinance threatened the ability of

* Versions of this paper were presented at the University of Minnesota and the University of California at Berkeley as well as at the Pittsburgh symposium. I am grateful to members of all these audiences for helpful comments. I have also benefitted greatly from discussions of this topic with Marshall Cohen, Clark Glymour, and Derek Parfit.

** Professor of Philosophy, Princeton University.

unpopular *political* groups to hold demonstrations.¹ I doubt whether the residents of Skokie would have been asked to pay such a high price to let some other kind of expression proceed. To take a different example, laws against false or deceptive advertising and the ban on cigarette advertising on television suggest that we are willing to accept legal regulation of the form and content of commercial advertising that we would not countenance if it were applied to other forms of expression. Why should this be so?

While I do not accept all of these judgments, I find it hard to resist the idea that different categories of expression should to some degree be treated differently in a theory of freedom of expression. On the other hand some ideas of freedom of expression seem to apply across the board, regardless of category: intervention by government to stop the publication of what it regards as a false or misleading view seems contrary to freedom of expression whether the view concerns politics, religion, sex, health or the relative desirability of two kinds of automobile. So the question is, to what extent are there general principles of freedom of expression, and to what extent is freedom of expression category-dependent? To the degree that the latter is true, how are the relevant categories defined?

I will begin by considering the individual interests that are the basis of our special concern with expression. In section three I will consider how several theories of freedom of expression have been based on certain of these interests, and I will sketch an answer to the first two questions raised above. Finally, in sections four and five, I will discuss the place of categories of expression within the framework I have proposed and apply this to the particular categories of political speech, commercial speech and pornography.

II. INTERESTS

What are the interests with which freedom of expression is concerned? It will be useful to separate these roughly into those interests we have in being able to speak, those interests we have in being exposed to what others have to say, and those interests we have as bystanders who are affected by expression in other ways. Since, however, I want to make it clear that "expression" as I am using it is not limited to speech, I will refer to these three groups of

1. *Village of Skokie v. National Socialist Party of America*, 69 Ill. 2d 605, 373 N.E. 2d 21 (1978).

interests as the interests of participants, the interests of audiences, and the interests of bystanders.

A. Participant Interests

The actions to which freedom of expression applies are actions that aim to bring something to the attention of a wide audience. This intended audience need not be the widest possible audience ("the public at large"), but it must be more than one or two people. Private conversations are not, in general, a matter of freedom of expression, not because they are unimportant to us but because their protection is not the aim of this particular doctrine. (It is a matter, instead, of privacy or of personal liberty of some other sort.) But private conversations might be viewed differently if circumstances were different. For example, if telephone trees (or whispering networks) were an important way of spreading the word because we lacked newspapers and there was no way for us to gather to hear speeches, then legal restrictions on personal conversations could infringe freedom of expression as well as being destructive of personal liberty in a more general sense. What this shows, I think, is that freedom of expression is to be understood primarily in terms of the interests it aims to protect and only secondarily in terms of the class of actions whose protection is, under a given set of circumstances, an adequate way to safeguard these interests.

The most general participant interest is, then, an interest in being able to call something to the attention of a wide audience. This ability can serve a wide variety of more specific purposes. A speaker may be interested in increasing his reputation or in decreasing someone else's, in increasing the sales of his product, in promoting a way of life, in urging a change in government, or simply in amusing people or shocking them. From a social point of view, these interests are not all equally important, and the price that a society is required to pay in order to allow acts of expression of a particular kind to flourish will sometimes be a function of the value of expression of that kind.

This is one reason why it would be a mistake to look for a distinction between pure speech (or expression), which is protected by freedom of expression, and expression that is part of some larger course of action, which is not so protected. It is true that some acts of expression seem not to qualify for first amendment protection because of the larger courses of action of which they are a part (assault, incitement). But what distinguishes these from other acts

of expression is not just that they are part of larger courses of action (which is true of almost all acts of expression), but rather the character of the particular courses of action of which they form a part. Their exclusion from first amendment protection should be seen as a special case of the more general phenomenon just mentioned: the protection to which an act of expression is entitled is in part a function of the value of the larger purposes it serves.

This cannot mean, of course, that the protection due a given act of expression depends on the actual value of the particular purposes at which it aims. It would be clearly antithetical to freedom of expression, for example, to accord greater protection to exponents of true religious doctrines than to exponents of false and misleading ones. Despite the fact that the objectives at which these two groups aim are of very different value, their acts of expression are (other things being equal) accorded equal status. This is so because the "further interest" that is at stake in the two cases is in fact the same, namely the interest we all have in being able to follow and promote our religious beliefs whatever they may be.

Here, then, is one way in which categories of expression arise. We are unwilling to bear the social costs of granting to just any expressive purpose the opportunities for expression that we would demand for those purposes to which we, personally, attach greatest importance. At the most concrete level, however, there is no agreement about the values to be attached to allowing particular acts of expression to go forward. It is just this lack of consensus, and the consequent unacceptability of allowing governments to regulate acts of expression on the basis of their perceived merits, that makes freedom of expression an important issue. In order to formulate a workable doctrine of freedom of expression, therefore, we look for something approaching a consensus on the relative importance of interests more abstractly conceived — the interest in religious expression, the interest in political expression, etc. Even this more abstract consensus is only approximate,² however, and never completely stable. As people's values change, or as a society becomes more diverse, consensus erodes. When this happens, either the ranking of interests must change or the categories of interests must be redefined, generally in a more abstract manner.³ Recent shifts in

2. How the existence of an approximate consensus, even though it is only approximate, can contribute to the legitimacy of the agreed-upon values as a basis for justification is a difficult problem which I cannot here discuss.

3. I have assumed here that categories of interests are disrupted by a decrease in

attitudes toward religion have provoked changes of both these kinds. As religion (or, as it is more natural to say here, *one's* religion) has come to be seen more as a matter of private concern on a par with other private interests, it has become harder to justify assigning religious concerns the pre-eminent value they have traditionally received. In order to make contemporary sense of this traditional assignment of values, on the other hand, there has been a tendency to redefine "religion" more abstractly as "a person's ultimate values and deepest convictions about the nature of life," thereby preserving some plausibility for the claim that we can all agree on the importance of religion in one's life even though we may have different beliefs.

The categories of participant interests I have been discussing are naturally identified with familiar categories of expression: political speech, commercial speech, etc. But we should not be too quick to make this identification. The type of protection that a given kind of expression requires is not determined by participant values alone. It also depends on such factors as the costs and benefits to non-participants and the reliability of available forms of regulation. Not surprisingly, these other factors also play a role in how categories of expression are defined. As will later become apparent, the lack of clarity concerning these categories results in part from the difficulty of seeing how these different elements are combined in their definition.⁴

consensus and an increase in diversity of views since this is the course of change we are most familiar with. I suppose that the reverse process — in which increasing consensus makes an abstract category seem pointlessly abstract and leads to its being redefined to include what was before only a special case — is at least possible. On the former, more familiar kind of transition, see E. DURKHEIM, *Individualism and the Intellectuals*, in EMILE DURKHEIM ON MORALITY AND SOCIETY 43 (R. Bellah ed. 1973). See also E. DURKHEIM, *DIVISION OF LABOR IN SOCIETY* (G. Simpson trans. 1933). Perhaps Marx's view of the transition to a socialist society includes an instance of the latter kind.

4. Here libel provides a good example. One reason for assigning it low status as a category of expressive acts is the low value attached to the participant interest in insulting people and damaging their reputations. This is something we sometimes want to do, but it gets low weight in our social calculus. Another reason is the high value we attach to not having our reputations damaged. These are not unrelated, but they do not motivate concern with the same class of actions. Other relevant considerations include the interest we may have in performing or having others perform acts which incidentally damage reputations. A defensible definition of libel as a category of expressive acts will be some resultant of all these factors, not simply of the first or the second alone.

B. Audience Interests

The interests of audiences are no less varied than those of participants: interests in being amused, informed on political topics, made aware of the pros and cons of alternatives available in the market, and so on. These audience interests conflict with those of participants in an important way. While participants sometimes aim only at communicating with people who are already interested in what they have to present, in a wide range of important cases their aims are broader: they want to gain the attention of people who would not otherwise consider their message. What audiences generally want, on the other hand, is to have expression available to them should they want to attend to it. Expression that grabs one's attention whether one likes it or not is generally thought of as a cost. But it should not be thought of only as a cost, even from the audience's point of view. As Mill rightly emphasized,⁵ there is significant benefit in being exposed to ideas and attitudes different from one's own, though this exposure may be unwelcome. If we had complete control over the expression we are exposed to, the chances are high that we would use this power to our detriment. The important and difficult question however, is, when unwanted exposure to expression is a good thing from the audience's point of view.

This question is relatively easy to answer if we think of it as a problem of balancing temporary costs of annoyance, shock or distraction against the more lasting benefits of a broadened outlook or deepened understanding. But it becomes more complicated if we take into account the possibility of more lasting costs such as being misled, having one's sensibilities dulled and cheapened, or acquiring foolish desires. This balancing task is simplified in the way we often think about expression by a further assumption about the audience's control. We are inclined to think that what would be ideal from the audience's point of view would be always to have the choice whether or not to be exposed to expression. Similarly, we have a tendency to assume that, having been exposed, an audience is always free to decide how to react: what belief to form or what attitude to adopt. This freedom to decide enables the audience to protect itself against unwanted long-range effects of expression. If we saw ourselves as helplessly absorbing as a belief every proposition we heard expressed, then our views of freedom of expression

5. J. MILL, ON LIBERTY ch. 2 (C. Shields ed. 1956).

would be quite different from what they are. Certainly we are not like that. Nonetheless, the control we exercise over what to believe and what attitudes to adopt is in several respects an incomplete protection against unwarranted effects of expression.

To begin with, our decisions about what to believe are often mistaken, even in the best of circumstances. More generally, the likelihood of our not being mistaken, and hence the reliability of our critical rationality as a defense mechanism, varies widely from case to case depending on our emotional state, the degree of background information we possess, and the amount of time and energy we have to assess what we hear. As these things vary, so too does the value of being exposed to expression and the value of being able to avoid it. Commonly recognized cases of diminished rationality such as childhood, panic, and mental illness are just extreme instances of this common variation.

Quite apart from the danger of mistakenly believing what we hear, there is the further problem that a decision to disbelieve a message does not erase all the effects it may have on us. Even if I dismiss what is said or shown to me as foolish and exaggerated, I am slightly different for having seen or heard it. This difference can be trivial but it can also be significant and have a significant effect on my later decisions. For example, being shown powerful photographs of the horrors of war, no matter what my initial reaction to them may be, can have the effect of heightening (or ultimately of dulling) my sense of the human suffering involved, and this may later affect my opinions about foreign policy in ways I am hardly aware of.

Expression influencing us in this way is a good thing, from the point of view of our interests as audiences, if it affects our future decisions and attitudes by making us aware of good reasons for them, so long as it does not interfere with our ability to weigh these reasons against others. Expression is a bad thing if it influences us in ways that are unrelated to relevant reasons, or in ways that bypass our ability to consider these reasons. "Subliminal advertising" is a good example of this. What is bad about it is not just that it is "subliminal," *i.e.* that we are influenced by it without being aware of that influence. This, I think, happens all the time and is, in many cases, unobjectionable. What is objectionable about subliminal advertising, if it works, is that it causes us to act — to buy popcorn, say, or to read Dostoevsky — by making us think we have a good reason for so acting, even though we probably have no such reason.

Suddenly finding myself with the thought that popcorn would taste good or that *Crime and Punishment* would be just the thing is often good grounds for acting in the relevant way. But such a thought is no reason for action if it is produced in me by messages flickered on the screen rather than by facts about my present state that indeed make this a good moment to go out for popcorn or to lie down with a heavy book.

I have assumed here that subliminal advertising works by leading us to form a false belief: we acquire a positive feeling toward popcorn which we then take, mistakenly, to be a sign that we would particularly enjoy some popcorn. One can easily imagine, however, that the effect is deeper.⁶ Suppose that what the advertising does is to change us so that we both have a genuine desire for popcorn and will in fact enjoy it. One can still raise the question whether being affected in this way is a good thing for us, but an answer to it cannot rely on the claim that we are made to think that we have a reason to buy popcorn when in fact we do not. For in this case we will have as good a reason to buy popcorn as we ever do: we want some and will enjoy it if we get it. Advertising of this kind will be a bad thing from the audience's point of view if one is worse off for having acquired such a desire, perhaps because it leads one to eat unhealthily, or because it distracts one from other pursuits, or for some other reason.

It is particularly galling to think of such effects being produced in us by another agent whose aim is to have us benefit him through actions we would not otherwise choose. But the existence of a conscious manipulator is not essential to the objections I have presented. It is a bad thing to acquire certain desires or to be influenced by false reasons, and these things are bad whether or not they are brought about by other agents. But while the existence of a conscious manipulator is not essential to this basic objection, it can be relevant in two further ways. What we should want in general is to have our beliefs and desires produced by processes that are reliable—processes whose effectiveness depends on the grounds for the beliefs and on the goodness of the desires it produces. We prefer to be aware of how we are being affected partly because this critical awareness increases the reliability of the process; although, as I have said, this safeguard is commonly overrated. Particularly where ef-

6. Here I am indebted to the discussion following the presentation of this paper at Berkeley and to comments by members of my graduate seminar for the Spring Term, 1979.

fects on us escape our notice, the existence of an agent controlling these effects can decrease the reliability of the process: the effects produced will be those serving this agent's purposes, and there may be no reason to think that what serves his purposes will be good from our point of view. (Indeed, the reverse is suggested by the fact that he chooses surreptitious means.) So the existence of a controlling agent can be relevant because of its implications for the reliability of the process. Beyond the question of reliability, however, we may simply prefer to have the choice whether or not to acquire a given desire; we may prefer this even where there is no certainty as to which desire it is better to have. This provides a further reason for objecting to effects produced in us by others (although this reason seems to hold as well against effects produced by inanimate causes).

The central audience interest in expression, then, is the interest in having a good environment for the formation of one's beliefs and desires. From the point of view of this interest, freedom of expression is only one factor among many. It is important to be able to hear what others wish to tell us, but this is not obviously more important than having affirmative rights of access to important information or to basic education. Perhaps freedom of expression is thought to differ in being purely negative: it consists merely in not being denied something and is therefore more easily justified as a right than are freedom of information or the right to education, which require others to provide something for us. But this distinction does not withstand a careful scrutiny. To begin with, freedom of expression adequately understood requires affirmative protection for expression, not just the absence of interference. Moreover, even nonintervention involves costs, such as the annoyance and disruption that expression may cause. On the other side, restrictions on freedom of information include not only failures to provide information but also attempts to conceal what would otherwise become public. When a government makes such an attempt for the purpose of stopping the spread of undesirable political opinions, this contravenes the same audience interests as an attempt to restrict publication, and the two seem to be objectionable on the same grounds. The fact that there is in the one case no "participant" whose right to speak is violated, but only a fact that remains undiscovered, seems not to matter.

C. Bystander Interests

I have mentioned that both participants and audiences can some-

times benefit from restrictions on expression as well as from the lack thereof. But the most familiar arguments for restricting expression appeal to the interests of bystanders. I will mention these only briefly. First are interests in avoiding the undesirable side effects of acts of expression themselves: traffic jams, the noise of crowds, the litter from leafletting. Second, and more important, are interests in the effect expression has on its audience. A bystander's interests may be affected simply by the fact that the audience has acquired new beliefs if, for example, they are beliefs about the moral character of the bystander. More commonly, bystanders are affected when expression promotes changes in the audience's subsequent behavior.

Regulation of expression to protect any of these bystander interests can conflict with the interests of audiences and participants. But regulation aimed at protecting bystanders against harms of the first type frequently strikes us as less threatening than that aimed at protecting bystanders against harmful changes in audience belief and behavior. This is true in part because the types of regulation supported by the two objectives are different. Protecting bystanders against harmful side effects of acts of expression calls for regulation only of the time, place and manner of expression, and in many cases such regulation merely inconveniences audiences and participants. It *need* not threaten central interests in expression. Regulation to protect interests of the second kind, however, must, if it is successful, prevent effective communication of an idea. It is thus in direct conflict with the interests of participants and, at least potentially, of audiences as well. But this contrast is significant only to the degree that there are some forms of effective expression through which participant and audience interests can be satisfied without occasioning bystander harms of the first type: where there is no surplus of effective means of expression, regulation of time, place, and manner can be just as dangerous as restrictions on content.

III. THEORIES

Although "freedom of expression" seems to refer to a right of participants not to be prevented from expressing themselves, theoretical defenses of freedom of expression have been concerned chiefly with the interests of audiences and, to a lesser extent, those of bystanders. This is true, for example, of Mill's famous defense in *On Liberty*,⁷ which argues that a policy of non-interference with expres-

7. J. MILL, *supra* note 5.

sion is preferable to a policy of censorship on two grounds: first, it is more likely to promote the spread of true beliefs and, second, it contributes to the well-being of society by fostering the development of better (more independent and inquiring) individuals. A similar emphasis on audience values is evident in Alexander Meiklejohn's theory.⁸ He argues that first amendment freedom of speech derives from the right of citizens of a democracy to be informed in order that they can discharge their political responsibilities as citizens.

This emphasis can be explained, I think, by the fact that theories of freedom of expression are constructed to respond to what are seen as the most threatening arguments for restricting expression. These arguments have generally proceeded by calling attention to the harms that unrestricted expression may bring to audiences and bystanders: the harm, for example of being misled, or that of being made less secure because one's neighbors have been misled or provoked into disaffection and unrest. The conclusion drawn is that government, which has the right and even the duty to protect its citizens against such harms, may and should do so by preventing the expression in question. Responding to this argument, theories of freedom of expression have tended to argue either that the interests in question are not best protected by restricting expression (Mill) or that "protecting" citizens in this way is illegitimate on other grounds (Meiklejohn).

The dialectical objective of Mill's argument helps to explain why, although he professes to be arguing as a utilitarian, he concentrates on just two goods, true belief and individual growth, and never explicitly considers how these are to be balanced off against other goods that would have to be taken into account in a full utilitarian argument.

The surprising narrowness of Meiklejohn's theory can be similarly explained. Meiklejohn was reacting against the idea that a "clear and present danger" could justify a government in acting to protect its citizens by curbing the expression of threatening political ideas. This seemed to him to violate the rights of those it claimed to protect. Accordingly, he sought to explain the "absolute" character of the first amendment by basing it in a right to be informed and to make up one's own mind. But is there such a right? Meiklejohn saw the basis for one in the deliberative role of citizens in a democratic political order. But a right so founded does not apply to all

8. A. MEIKLEJOHN, *POLITICAL FREEDOM* (1960).

forms of expression. Debates over artistic merit, the best style of personal life, or the promotion of goods in the marketplace may have their importance, but Meiklejohn saw these forms of expression as pursuits on a par with many others, unable to claim any distinct right to immunity from regulation. He was thus led to concede that these activities, in the main, fall outside the area of fundamental first amendment protection or, rather, that they qualify for it only insofar as their general importance makes them relevant to political decisions.

This narrowness is an unsatisfactory feature of what is in many ways an interesting and appealing theory. Moreover, given this emphasis on political rights as the basis of first amendment protection of speech, it is particularly surprising that Meiklejohn's theory should take audience values — the right of citizens to be informed — as the only fundamental ones. For prominent among the political rights of democratic citizens is the right to participate in the political process — in particular, the right to argue for one's own interests and point of view and to attempt to persuade one's fellow citizens. Such rights of participation do not entirely derive from the need of one's fellow citizens to be informed; the right to press one's case and to try to persuade others of its validity would not evaporate if it could be assumed that others were already perfectly informed on the questions at issue. Perhaps Meiklejohn would respond by saying that what is at stake is not a matter of being informed in the narrow sense of possessing all the relevant information. Democratic citizens also need to have the arguments for alternative policies forcefully presented in a way that makes their strengths and weaknesses more apparent, stimulates critical deliberation and is conducive to the best decision. Surely, it might be asked, when political participation reaches the point where it becomes irrelevant to or even detracts from the possibility of good political decisions, what is the argument in its favor? I will return to this question of the relation between participant and non-participant interests in section five.⁹

Several years ago I put forward a theory of freedom of expression¹⁰ that was very much influenced by Meiklejohn's views. Like him, I wanted to state a principle of freedom of expression which had a kind of absoluteness or at least a partial immunity from balancing against other concerns. But I wanted my theory to be

9. See pp. 32-34 *infra*.

10. Scanlon, *A Theory of Freedom of Expression*, 1 *PHILOSOPHY & PUB. AFF.* 204 (1972).

broader than Meiklejohn's. I wanted it to cover more than just political speech, and I thought it should give independent significance to participant and audience interests. The basis of my theory was a single, audience-related principle applying to all categories of expression.

The Millian Principle:

There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are: (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.¹¹

I undertook to defend this principle by showing it to be a consequence of a particular idea about the limits of legitimate political authority: namely that the legitimate powers of government are limited to those that can be defended on grounds compatible with the autonomy of its citizens — compatible, that is, with the idea that each citizen is sovereign in deciding what to believe and in weighing reasons for action.¹² This can be seen as a generalized version of Meiklejohn's idea of the political responsibility of democratic citizens.

The Millian Principle was intended to rule out the arguments for censorship to which Mill and Meiklejohn were responding. It did this by ruling that the harmful consequences to which these arguments appeal cannot count as potential justifications for legal restriction of expression. But there are other ways to arrive at policies that would strike us as incompatible with freedom of expression. One such way would be to restrict expression excessively, simply on the ground that it is a nuisance or has other undesirable consequences of a kind that the Millian Principle does allow to be weighed. So the second component in a theory of the type I described counters "excessive" restriction of this type by specifying that participant and audience interests in expression are to receive high values when they are balanced against competing goods. (As I have indicated, these values vary from one type of expression to another.) But freedom of expression does not only require that there

11. *Id.* at 213.

12. *Id.* at 215.

should be "enough" expression. The two further components of the theory require that the goods of expression (for both participants and audiences) should be distributed in ways that are in accord both with the general requirements of distributive justice and with whatever particular rights there may be, such as rights to political participation, that support claims for access to means of expression.

This theory identifies the Millian Principle as the only principle concerned specifically with *expression* (as opposed to a general principle of justice) that applies with the same force to all categories of expression. If correct, then, it would answer one of the questions with which I began.¹³ But is it correct? I now think that it is not.¹⁴

To begin with, the Millian Principle has what seem to be implausible consequences in some cases. For example, it is hard to see how laws against deceptive advertising or restrictions such as the ban on cigarette advertising on television could be squared with this principle. There are, of course, ways in which these objections might be answered. Perhaps the policies in question are simply violations of freedom of expression. If, on the other hand, they are acceptable this is because they are examples of justified paternalism, and my original theory did allow for the Millian Principle to be set aside in such cases.¹⁵ But the theory provided for this exception only in cases of severely diminished rationality, because it took the view that any policy justified on grounds violating the Millian Principle would constitute paternalism of a particularly strong form.¹⁶ The advertising cases seem to be clear counterexamples to this latter claim. More generally, clause (a) of the Millian Principle, taken as a limitation that can be set aside only in cases where our rational capacities are severely diminished, constitutes a rejection of paternalism that is too strong and too sweeping to be plausible. An acceptable doctrine of justified paternalism must take into account such factors as the value attached to being able to make one's own decisions, as well as the costs of so doing and the risks of empowering the government to make them on one's behalf. As the advertising examples show, these factors vary from case to case even where no general loss of rational capacities has occurred.

But the problems of the Millian Principle are not limited to

13. See p. 520 *supra*.

14. In what follows I am indebted to a number of criticisms, particularly to objections raised by Robert Amdur and by Gerald Dworkin.

15. Scanlon, *supra* note 10, at 220.

16. *Id.* at 221.

cases of justified paternalism. The principle is appealing because it protects important audience interests—interests in deciding for one's self what to believe and what reasons to act on. As I have remarked earlier, these interests depend not only on freedom of expression, but also on other forms of access to information, education and so on. Consideration of these other measures shows that there are in general limits to the sacrifices we are willing to make to enhance our decision-making capacity. Additional information is sometimes not worth the cost of getting it. The Millian Principle allows some of the costs of free expression to be weighed against its benefits, but holds that two important classes of costs must be ignored. Why should we be willing to bear unlimited costs to allow expression to flourish provided that the costs are of these particular kinds? Here it should be borne in mind that the Millian Principle is a restriction on the authority of legitimate governments. Now it may well be that, as I would argue, there is *some* restriction of this kind on the costs that governments may take as grounds for restricting expression, and that this is so because such a restriction is a safeguard that is more than worth the costs involved. But an argument for this conclusion, if it is to avoid the charge of arbitrariness and provide a convincing account of the exact form that the restriction takes, must itself be based on a full consideration of all the relevant costs.

What these objections mainly point to, then, is a basic flaw in the argument I offered to justify the Millian Principle. There are many ways in which the appealing, but notoriously vague and slippery notion of individual autonomy can be invoked in political argument. One way is to take autonomy, understood as the actual ability to exercise independent rational judgment, as a good to be promoted. Referring to "autonomy" in this sense is a vague, somewhat grandiloquent and perhaps misleading way of referring to some of the most important audience interests described in section two. The intuitive arguments I have offered in the present section appeal to the value of autonomy in this sense. These audience interests were also taken into account in the second component of my earlier theory. My argument for the Millian Principle, on the other hand, employed the idea of autonomy in a different way, namely as a constraint on justifications of authority. Such justifications, it was held, must be compatible with the thesis that citizens are equal,

autonomous rational agents.¹⁷

The idea of such a constraint now seems to me mistaken. Its appeal derives entirely from the value of autonomy in the first sense, that is, from the importance of protecting central audience interests. To build these interests in at the outset as constraints on the process of justification gives theoretical form to the intuition that freedom of expression is based on considerations that cannot simply be outweighed by competing interests in the manner that "clear and present danger" or "pure balancing" theories of the first amendment would allow. But to build these audience interests into the theory in this way has the effect of assigning them greater and more constant weight than we in fact give them. Moreover, it prevents us from even asking whether these interests might in some cases be better advanced if we could shield ourselves from some influences. In order to meet the objections raised to the Millian Principle, it is necessary to answer such questions, and, in general, to take account of the variations in audience interests under varying circumstances. But this is not possible within the framework of the argument I advanced.

Most of the consequences of the Millian Principle are ones that I would still endorse. In particular, I still think that it is legitimate for the government to promote our personal safety by restricting information about how to make your own nerve gas,¹⁸ but not legitimate for it to promote our safety by stopping political agitation which could, if unchecked, lead to widespread social conflict. I do not think that my judgment in the latter case rests simply on the difficulty of predicting such consequences or on the idea that the bad consequences of allowing political controversy will in each such case be outweighed by the good. But I do not think that the difference between the two cases can be found in the distinction between restricting means and restricting reasons, as my original article suggested. The difference is rather that where political issues are involved governments are notoriously partisan and unreliable. Therefore, giving government the authority to make policy by balancing interests in such cases presents a serious threat to particularly important participant and audience interests. To the degree that the considerations of safety involved in the first case are clear and serious, and the participant and audience interests that might suffer

17. *Id.* at 215.

18. *Id.* at 211-13.

from restriction are not significant, regulation could be acceptable.

In this way of looking at things, political speech stands out as a distinctively important category of expression. Meiklejohn's mistake, I think, was to suppose that the differences in degree between this category and others mark the boundaries of first amendment theory. My mistake, on the other hand, was that in an effort to generalize Meiklejohn's theory beyond the category of political speech, I took what were in effect features peculiar to this category and presented them, under the heading of autonomy, as *a priori* constraints on justifications of legitimate authority.

In order to avoid such mistakes it is useful to distinguish several different levels of argument. At one extreme is what might be called the "level of policy," at which we might consider the overall desirability or undesirability of a particular action or policy, *e.g.*, an ordinance affecting expression. At the other extreme is what might be called the "foundational level." Argument at this level is concerned with identifying the ultimate sources of justification relevant to the subject at hand. In the case of expression, these are the relevant participant, audience and bystander interests and the requirements of distributive justice applicable to their satisfaction. Intermediate between these levels is the "level of rights."¹⁹ The question at this level is what limitations and requirements, if any, must be imposed on policy decisions if we are to avoid results that would be unacceptable with respect to the considerations that are defined at the fundamental level? To claim that something is a right, then, is to claim that some limit or requirement on policy decisions is *necessary* if unacceptable results are to be avoided, and that this particular limit or requirement is a *feasible* one, that is, that its acceptance provides adequate protection against such results and does so at tolerable cost to other interests. Thus, for example, to claim that a particular restriction on searches and seizures is part of a right of privacy would be to claim that it is a feasible form of necessary protection for our important and legitimate interests in being free from unwanted observation and intrusion. What rights there are in a given social setting at a given time depends on which judgments of necessity and feasibility are true at that place and time.²⁰ This will depend on the nature of the main threats to the

19. For a presentation of this view at greater length, see Scanlon, *Rights, Goals and Fairness*, in *PUBLIC AND PRIVATE MORALITY* (S. Hampshire ed. 1978).

20. Of course there may be multiple solutions to the problem; that is, different ways in which a right might be defined to give adequate protection to the interests in question. In

interests in question, on the presence or absence of factors tending to promote unequal distribution of the means to their satisfaction, and particularly on the characteristics of the agents (private individuals or governments) who make the relevant policy decisions: what power do they have, and how are they likely to use this power in the absence of constraints?

Most of us believe that freedom of expression is a right. That is, we believe that limits on the power of governments to regulate expression are necessary to protect our central interests as audiences and participants, and we believe that such limits are not incompatible with a healthy society and a stable political order. Hundreds of years of political history support these beliefs. There is less agreement as to exactly how this right is to be understood — what limits and requirements on decision making authority are necessary and feasible as ways of protecting central participant and audience interests and insuring the required equity in the access to means of expression. This is less than surprising, particularly given the fact that the answer to this question changes, sometimes rapidly, as conditions change. Some threats are constant — for example the tendency of governments to block the expression of critical views — and these correspond to points of general agreement in the definition of the right. But as new threats arise — from, for example, changes in the form or ownership of dominant means of communication — it may be unclear, and a matter subject to reasonable disagreement, how best to refine the right in order to provide the relevant kinds of protection at a tolerable cost. This disagreement is partly empirical — a disagreement about what is likely to happen if certain powers are or are not granted to governments. It is also in part a disagreement at the foundational level over the nature and importance of audience and participant interests and, especially, over what constitutes a sufficiently equal distribution of the means to their satisfaction. The main role of a philosophical theory of freedom of expression, in addition to clarifying what it is we are arguing about, is to attempt to resolve these foundational issues.

What reasons are there for taking this view of rights in general and of freedom of expression in particular? One reason is that it can account for much of what we in fact believe about rights and can

such a case what there is a right to initially is *some* protection of the relevant kind. At this point the right is incompletely defined. Once one adequate form of protection becomes established as a constraint on policy making, the other alternatives are no longer *necessary* in the relevant sense. In this respect our rights are partly determined by convention.

explain what we do in the process of defending and interpreting them. A second reason is that its account of the bases of rights appears to exhaust the relevant concerns: if a form of regulation of expression presents no threat to the interests I have enumerated, nor to the equitable distribution of the means to their satisfaction, what further ground might there be to reject it as violating freedom of expression? Beyond these two reasons, all I can do in defense of my view is to ask, what else? If rights are not instrumental in the way I have described, what are they and what are the reasons for taking them seriously?

IV. CATEGORIES

Let me distinguish two ways in which arguments about freedom of expression may involve distinctions between categories of expression. First, not every participant or audience interest is capable of exerting the same upward pressure on the costs freedom of expression requires us to bear. Freedom of expression often requires that a particular form of expression—leafletting or demonstrations near public buildings—be allowed despite high bystander costs because important participant or audience interests would otherwise be inadequately or unequally served. Such arguments are clearly category-dependent: their force depends on the importance of the particular participant or audience interests in question. But, once it is concluded on the basis of such an argument that a given mode of expression must be permitted, there is the further question whether its use must be permitted for any form of expression or whether it may be restricted to those types of expression whose value was the basis for claiming that this mode of expression must be allowed. If the latter, then not only will categories of interests be assigned different weights in arguments about the content of the right of freedom of expression, but the application of this right to particular cases will also involve determining the category to which the acts in question belong. I will refer to these two forms of categorization as, respectively, categories of interests and categories of acts.

This distinction can be illustrated by considering the ways in which “political speech” can serve as a category. For the purposes of this discussion, I will assume that “political” is to be interpreted narrowly as meaning, roughly, “having to do with the electoral process and the activities of government.” We can distinguish a category of interests in expression that are political in this sense, includ-

ing both participant interests in taking part in the political process and audience (and bystander) interests in the spread of information and discussion about political topics. As a category of acts, on the other hand, "political speech" might be distinguished²¹ either by participant intent—expression with a political purpose—or by content and effect—expression that concerns political issues or contributes to the understanding of political issues. These two definitions correspond, roughly, to the two sets of interests just mentioned. I will assume for the moment that the category of political speech is to be understood to include acts falling under either of these definitions.

While the political interests in expression, are not uniquely important, the fact that they are inadequately or very unequally served constitutes a strong reason for enlarging or improving available modes of expression. Their particular importance as a source of upward pressure is something that rational argument about freedom of expression must recognize. Must "political speech" be recognized as a category of acts as well? That is, can the fact that an act of expression has the relevant political intent or content exempt it from regulation that would otherwise be compatible with freedom of expression?

Special standards for defamation applicable to expression concerning "public officials," "public figures" or "public issues"²² indicate that something like "political speech" does function as a category of acts in the current legal understanding of freedom of expression. Reflection on the *Skokie* case may also suggest that "political speech" has a special place in our intuitive understanding of this right. It seems unlikely that expression so deeply offensive to bystanders would be deemed to be protected by freedom of expression if it did not have a political character—if, for example, its purpose had been merely to provide entertainment or to promote commerce. But I do not see how this interpretation of freedom of expression can be defended, at least unless "political" is understood in a very broad sense in which any important and controversial question counts as

21. Distinguished, that is, from other forms of protected expression. I am concerned here only with what marks speech as political. A full definition of "political speech" (*i.e.* permissible political expression) would, in order to exclude such things as bombings, take into account features other than those mentioned here. See note 4 *supra*.

22. See the line of cases following *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See, *e.g.*, *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Herbert v. Lando*, 99 S.Ct. 1635 (1979); *Hutchinson v. Proxmire*, 99 S.Ct. 2675 (1979).

a "political issue." Expression that is political in the narrow sense is both important and in need of protection, but it is not unique in either respect. Furthermore, even if "political" is understood broadly, the idea that access to a mode of expression can be made to depend on official determination of the "political" nature of one's purposes or one's message does not sit comfortably with the basic ideas of freedom of expression.

This suggests a second, more plausible analysis of the *Skokie* case, one which relies more heavily on categories of interests and less on categories of acts. The judgment that the Nazi march is protected may reflect the view that no²³ ordinance giving local authorities the power to ban such a march could give adequate protection to central interests in political expression. This argument avoids any judgment as to whether the content and purposes of this particular march were "genuinely political." It relies instead on the judgment that such a march could not be effectively and reliably distinguished from political expression that it is essential to protect.

The distinction between categories of interests and categories of acts can be used to explain some of the ambivalence about categories noted at the beginning of this article. Reference to categories of interests is both important and unavoidable in arguments about freedom of expression. Categories of acts may also be unavoidable—"expression" is itself such a category, and assault, for example, is distinguished from it on the basis of participant intent—but there are good reasons for being wary of categories of acts and for keeping their use to a minimum. Even where there is agreement on the relative importance of various interests in expression, the purposes and content of a given expressive act can be a matter of controversy and likely misinterpretation, particularly in those situations of intense conflict and mistrust in which freedom of expression is most important. (Well-known difficulties in the application of laws against incitement are a good illustration of this point.) Thus the belief that the fundamental principles of freedom of expression must transcend categories derives in part from the recognition that categories of acts rest on distinctions—of intent and content—that a partisan of freedom of expression will instinctively view with suspicion. Nonetheless, in interpreting freedom of expression,

23. Of course an actual decision need only find a particular ordinance unconstitutional. I take it, however, that an intuitive judgment that an action is protected by freedom of expression is broader than this and implies that *no* acceptable ordinance could restrict that action.

we are constantly drawn toward categories of acts as we search for ways of protecting central interests in expression while avoiding unacceptable costs. The current struggle to define the scope of special standards of defamation²⁴ is a good example of this process. Identifying the categories of acts that can actually be relied upon to give the protection we want is a matter of practical and strategic judgment, not of philosophical theory.

I have mentioned the possibility of official misapplication as one reason for avoiding categories of acts, but this is not the only problem. A second difficulty is the fact that it is extremely difficult to regulate one category of speech without restricting others as well. Here the recent campaign financing law is an instructive example.²⁵ The basic aim of restricting money spent during a campaign in order to increase the fairness of this particular competition is entirely compatible with freedom of expression. The problem is that in order to regulate spending effectively, it was deemed necessary to make campaign funds flow through a single committee for each candidate. In order to do this a low limit was placed on the amount any private person or group could spend on expression to influence the campaign. But since spending on expression to influence a campaign cannot be clearly separated from expression on political topics generally, the limit on private spending constituted an unacceptable restriction on expression. Limits on spending for "campaign speech" are in principle as compatible with freedom of expression as limits on the length of speeches in a town meeting: both are acceptable when they enhance the fairness of the proceedings. Unlike a town meeting, however, "campaign speech" is not easily separated from other expression on political topics, hence not easily regulated in a way that leaves this other expression unaffected.

In addition to the difficulty of regulating one category without affecting others, there is the further problem that the categories within which special regulation is held to be permissible may themselves suffer from dangerous overbreadth. I believe that this is true, for example, of the category of commercial speech. Presumably "commercial speech" is to be defined with reference to participant intent: expression by a participant in the market for the purpose of

24. See cases cited note 22 *supra*.

25. *Buckley v. Valeo*, 424 U.S. 1 (1976). Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), as amended by Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974), as amended by Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976).

attracting buyers or sellers. It is not identical with advertising, which can serve a wide variety of expressive purposes, and it cannot be defined by its subject matter: *Consumer Reports* has the same subject matter as much commercial speech, but it is entitled to "full" first amendment protection. Why, then, would anyone take commercial speech to be subject to restrictions that would not be acceptable if applied to other forms of expression? This view is widely held, or has been until recently,²⁶ and it appears to be supported by the acceptability of laws against false or deceptive advertising, the regulation of cigarette advertising and restriction on the form of classified advertisements of employment opportunities. One reason for this attitude may be that the participant and audience interests at stake in commercial speech — promoting one's business, learning what is available in the market — are not generally perceived as standing in much danger from overrestriction. There is, we are inclined to think, plenty of opportunity for advertising, and we are in no danger of being deprived of needed information if advertising is restricted. In fact, the relevant audience interests are in much more danger from excessive exposure to advertising, and from false and deceptive advertising. In addition, laws against such advertising seem acceptable in a way that analogous laws against false or deceptive political or religious claims would not be, first because there are reasonably clear and objective criteria of truth in this area, and second, we regard the government as much less partisan in the competition between commercial firms than in the struggle between religious or political views.

Much of this is no doubt true, but it does not support the generalization that commercial speech as a category is subject to less stringent requirements of freedom of expression. The restrictions I have mentioned, where they seem justified, can be supported by arguments that are applicable in principle to other forms of expression (for example, by appeals to qualified paternalism, or to the advantages for audiences of protection against an excessive volume of expression). It is a mistake to think that these arguments are applicable only to commercial speech or that all commercial speech is especially vulnerable to them. In particular, if, as I believe, the assumption that governments are relatively neutral and trustworthy in this area is one reason for our complacent attitude

26. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) *reh. denied* 434 U.S. 881 (1977); *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748 (1976).

toward regulation of commercial speech, this assumption should be made explicit and treated with care. There are many cases that clearly count as commercial speech in which our traditional suspicions of governmental regulation of expression are as fully justified as they are elsewhere. One such example might be an advertising battle between established energy companies and anti-establishment commercial enterprises promoting alternative energy sources.²⁷

V. PORNOGRAPHY

In this final section I will consider the category of pornography. This example will illustrate both the problems of categories, just discussed, and some of the problems concerning participant and audience interests that were discussed in section two above.

The question to ask about pornography is, why restrict it? I will consider two answers. The first appeals to the interest people have in not being unwillingly exposed to offensive material. By offense, I do not mean a reaction grounded in disapproval but an immediate discomfort analogous to pain, fear or acute embarrassment. I am willing to assume for purposes of argument that many people do have such a reaction to some sexual material, and that we should take seriously their interest in being protected against it. I also agree that what offends most people will differ from place to place depending on experience and custom. Therefore the appropriate standards of protection may also vary. But if this were the only reason for restricting pornography the problem would have an easy solution: restrict what can be displayed on the public streets or otherwise forced on an unwilling audience but place no restrictions whatever on what can be shown in theaters, printed in books or sent through the mails in plain brown wrappers. The only further requirement is that the inconvenience occasioned by the need to separate the two groups should be fairly shared between them.

The idea that this solution should be acceptable to all concerned rests on specific assumptions about the interests involved. It is assumed that consumers of pornography desire private enjoy-

27. It might be claimed that insofar as this example has the character I mention it is an instance of political, not merely commercial, speech. Certainly it does have a political element. Nonetheless, the intentions of the participants (and the interests of audiences) may be thoroughly commercial. The political element of the controversy triggers first amendment reactions because it raises the threat of partisan regulation, not because the interests at stake, on the part of either participants or audience, are political.

ment, that sellers want to profit from selling to those who have this desire, and that other people want to avoid being forced to see or hear what they regard as offensive. Rarely will one find three sets of interests that are so easily made compatible. There are of course certain other interests which are left out of this account. Perhaps some people want to enjoy pornography in public; their pleasure depends on the knowledge that they are disturbing other people. Also, sellers may want to reach a larger audience in order to increase profits, so they would like to use more stimulating advertisements. Finally, those who wish to restrict pornography may be offended not only by the sight of it but even by the knowledge that some people are enjoying it out of their sight; they will be undisturbed only if it is stopped. But none of these interests has significant weight. There is, to be sure, a general problem of explaining what makes some interests important and others, like these, less significant; but this is not a problem peculiar to freedom of expression.

Unfortunately, offense is not the only reason to restrict pornography. The main reason, I think, is the belief that the availability, enjoyment and even the legality of pornography will contribute to undesirable changes in our attitudes toward sex and in our sexual mores. We all care deeply about the character of the society in which we will live and raise our children. This interest cannot be simply dismissed as trivial or illegitimate. Nor can we dismiss as empirically implausible the belief that the evolution of sexual attitudes and mores is strongly influenced by the books and movies that are generally available and widely discussed, in the way that we can dismiss the belief that pornography leads to rape. Of course, expression is not the only thing that can influence society in these ways. This argument against pornography has essentially the same form as well-known arguments in favor of restricting non-standard sexual conduct.²⁸ If the interest to which these arguments appeal is, as I have conceded, a legitimate one, how can the arguments be answered?

I think that transactions "between consenting adults" can sometimes legitimately be restricted on the ground that, were such transactions to take place freely, social expectations would change, people's motives would be altered and valued social practices would as a result become unstable and decline. I think, for example, that some commercial transactions might legitimately be restricted on

28. See DEVLIN, *THE ENFORCEMENT OF MORALS* (1965).

such grounds. Thus Richard Titmuss,²⁹ opposing legalization of blood sales in Britain, claims that the availability of blood on a commercial basis weakens people's sense of interdependence and leads to a general decline in altruistic motivation. Assuming for the purposes of argument that this empirical claim is correct, I am inclined to think that there is no objection to admitting this as a reason for making the sale of blood illegal. To ban blood sales for this reason seems at first to be objectionable because it represents an attempt by the state to maintain a certain state of mind in the population. What is objectionable about many such attempts, which violate freedom of expression, is that they seek to prevent changes of mind by preventing people from considering and weighing possible reasons for changing their minds. Such interventions run contrary to important audience interests. As far as I can see, however, the presence of a market in blood does not put us in a better position to decide how altruistic we wish to be.

There are of course other objections to outlawing the sale of blood, objections based simply on the value of the opportunity that is foreclosed. Being deprived of the opportunity to sell one's blood does not seem to me much of a loss. In the case of proposed restrictions on deviant sexual conduct, however, the analogous costs to the individuals who would be restricted are severe—too severe to be justified by the considerations advanced on the other side. In fact, the argument for restriction seems virtually self-contradictory on this score. What is the legitimate interest that people have in the way their social mores evolve? It is in large part the legitimate interest they have in not being under pressure to conform to practices they find repugnant under pain of being thought odd and perhaps treated as an outcast. But just this interest is violated in an even more direct way by laws against homosexual conduct.

The case for restricting pornography might be answered in part by a similar argument, but there is also a further issue, more intrinsic to the question of freedom of expression. Once it is conceded that we all have legitimate and conflicting interests in the evolution of social attitudes and mores, the question arises how this conflict can fairly be resolved. In particular, is majority vote a fair solution? Can the majority be empowered to preserve attitudes they like by restricting expression that would promote change? The answer to this

29. R. TITMUSS, *THE GIFT RELATIONSHIP* chs. 13-15 (1971). See also Singer, *Altruism and Commerce*, 2 *PHILOSOPHY & PUB. AFF.* 312 (1973).

question is clearly no. One reason is that, as Meiklejohn would emphasize, the legitimacy of majoritarian political processes themselves depends upon the assumption that the voters have free access to information and are free to attempt to persuade and convince each other. Another reason is that, unlike a decision where to build a road, this is an issue that need not be resolved by a clear decision at any one time. There is hence no justification for allowing a majority to squeeze out and silence a minority. A fair alternative procedure is available: a continuing process of "informal politics" in which the opposing groups attempt to alter or to preserve the social consensus through persuasion and example.

This response to the argument for restricting pornography has several consequences. First, since it rests upon viewing public interaction under conditions of freedom of expression as an informal political process that is preferable to majority voting as a way of deciding certain important questions, the response is convincing only if we can argue that this process is in fact fair. It will not be if, for example, access to the main means of expression, and hence the ability to have an influence on the course of public debate, are very unequally distributed in the society. Thus, equity in the satisfaction of participant interests, discussed above as one goal of freedom of expression, arises here in a new way as part of a defense of freedom of expression against majority control.

A second consequence of the argument is that time, place and manner restrictions on obscene material, which at first seemed a satisfactory solution to the problem of offense, are no longer so obviously satisfactory. Their appeal as a solution rested on the supposition that, since the interests of consumers and sellers of pornography were either purely private or simply commercial, unwilling audiences were entitled to virtually complete protection, the only residual problem being the relatively trivial one of how to apportion fairly the inconvenience resulting from the need to shield the two groups from each other. But if what the partisans of pornography are entitled to (and what the restrictors are trying to deny them) is a fair opportunity to influence the sexual mores of the society, then it seems that they, like participants in political speech in the narrow sense,³⁰ are entitled to at least a certain degree of access even to

30. Perhaps Meiklejohn would defend "offensive" discussion of sexual topics in a similar fashion, construing it as a form of political speech. Several differences should be noted, however. First, my argument appeals to participant interests rather than to the audience interests Meiklejohn emphasizes. Second, the politics I am concerned with here is an informal

unwilling audiences. I do not find this conclusion a particularly welcome one, but it seems to me difficult to avoid once the most important arguments against pornography are taken seriously. Let me conclude by considering several possible responses.

The argument I have presented starts from the high value to be assigned to the participant interest in being able to influence the evolution of attitudes and mores in one's society. But while some publishers of "obscene" materials have this kind of crusading intent, undoubtedly many others do not. Perhaps the proper conclusion of my argument is not that any attempt to publish and disseminate offensive sexual material is entitled to full first amendment protection but, at most, that such protection can be claimed where the participant's intent is of the relevant "political" character. This would construe "pornography" as a category of acts in the sense defined above: sexually offensive expression in the public forum need not be allowed where the intent is merely that of the pornographer — who aims only to appeal to a prurient interest in sex — but must be allowed where the participant has a "serious" interest in changing society. To take "the obscene" as a category of acts subject to extraordinary regulation would involve, on this view, the same kind of overbreadth that is involved when "commercial speech" is seen as such a category. In each case features typical of at most some instances are taken to justify special treatment of the category as a whole.

As I indicated in section four above, distinctions based on participant intent cannot be avoided altogether in the application of the right of freedom of expression, but they are nearly always suspect. This is particularly so in the present case; expression dealing with sex is particularly likely to be characterized, by those who disapprove of it, as frivolous, unserious and of interest only to dirty minds. To allow expression in this area to be regulated on the basis of participant intent would be to set aside a normal caution without, as far as I can see, any ground for doing so.

process distinct from the formal democratic institutions he seems to have in mind. Participation in this informal process is not important merely as a preliminary to making decisions in one's official capacity as a citizen. But even if Meiklejohn would not construe the political role of citizens this narrowly, a further difference remains. Having an influence on the evolving mores of one's society is, in my view, only one important participant interest among many, and I would not make the validity of all first amendment claims depend on their importance for our role in politics of either the formal or the informal sort. It is true, however, that those ideas controversial enough to be in greatest need of first amendment protection are likely also to be the subject of politics in one or both of these senses. See note 27 *supra*.

The conclusion that unwilling audiences cannot be fully protected against offensive expression might be avoided in a second way. Even if the "political interest" in expression on sexual topics is an important interest, and even if it supports a right of access to unwilling audiences, there is a further question whether this interest requires the presentation of "offensive" material. Perhaps it would be enough to be entitled to present material that "deals with" the question of sexual mores in a sober and non-offensive manner. Perhaps Larry Flynt and Ralph Ginzburg should, on the one hand, be free to sell as much pornography as they wish for private consumption, and they should on the other hand be free to write newspaper editorials and books, make speeches, or go on television as much as they can to crusade for a sexually liberated society. But the latter activity, insofar as it presses itself on people's attention without warning, is subject to the requirement that it not involve offense.

On the other side, it can be claimed that this argument rests on an overly cognitive and rationalistic idea of how people's attitudes change. Earnest treatises on the virtues of a sexually liberated society can be reliably predicted to have no effect on prevailing attitudes towards sex. What is more likely to have such an effect is for people to discover that they find exciting and attractive portrayals of sex which they formerly thought offensive or, vice versa, that they find boring and offensive what they had expected to find exciting and liberating. How can partisans of sexual change be given a fair chance to make this happen except through a relaxation of restrictions on what can be publicly displayed? I do not assume that the factual claims behind this argument are correct. My question rather is, if they were correct what would follow? From the fact that frequent exposure to material previously thought offensive is a likely way to promote a change in people's attitudes, it does not follow that partisans of change are entitled to use this means. Proponents of a change in attitude are not entitled to use just *any* expressive means to effect their aim even if the given means is the only one that would actually have the effect they desire: audience interests must also be considered. It must be asked whether exposure to these means leads to changes in one's tastes and preferences through a process that is, like subliminal advertising, both outside of one's rational control and quite independent of the relevant grounds for preference, or whether, on the contrary, the exposure to such influences is in fact part of the best way to discover what one really has reason to prefer. I think that a crucial question regarding the regula-

tion of pornography and other forms of allegedly corrupting activity lies here.

It is often extremely difficult to distinguish influences whose force is related to relevant grounds for the attitudes they produce from influences that are the work of irrelevant factors. Making this distinction requires, in many cases, a clearer understanding than we have both of the psychological processes through which our attitudes are altered and of the relevant grounds for holding the attitudes in question. The nature of these grounds, in particular, is often a matter of too much controversy to be relied upon in defining a right of freedom of expression. The power to restrict the presentation of "irrelevant influences" seems threatening because it is too easily extended to restrict any expression likely to mislead.

Subliminal advertising is in this respect an unusual case, from which it is hard to generalize. A law against subliminal advertising could be acceptable on first amendment grounds because it could be framed as a prohibition simply of certain techniques — the use of hidden words or images — thus avoiding controversial distinctions between relevant and irrelevant influences. Where we are concerned with the apparent — as opposed to the hidden — content of expression, however, things become more controversial (even though it is true that what is clearly seen or heard may influence us, and be designed to do so, in ways that we are quite unaware of).

The case for protecting unwilling audiences against influence varies considerably from one kind of offensive expression to another, even within the class of what is generally called pornography. The separation between the way one's attitudes are affected by unwanted exposure to expression and the relevant grounds for forming such attitudes is clearest in the case of pornography involving violence or torture. The reasons for being opposed to, and revolted by, these forms of behavior are quite independent of the question whether one might, after repeated exposure, come to find them exciting and attractive. This makes it plausible to consider such changes in attitude produced by unchosen exposure to scenes of violence as a kind of harm that an unwilling audience is entitled to protection against.³¹ The question is whether this protection can be given without unacceptably restricting other persuasive activity

31. Prohibiting the display of such scenes for willing audiences is a separate question. So is their presentation to children. Here and throughout this article I am concerned only with adults.

involving scenes of violence, such as protests against war.

The argument for protection of unwilling audiences is much weaker where what is portrayed are mildly unconventional sexual attitudes or practices, not involving violence or domination. Here it is more plausible to say that discovering how one feels about such matters when accustomed to them is the best way of discovering what attitude towards them one has reason to hold. The lack of independent grounds for appraising these attitudes makes it harder to conceive of changes produced by expression as a kind of harm or corruption. Even here there are some independent grounds for appraisal, however.³² Attitudes towards sex involve attitudes towards other people, and the reasons for or against holding *these* attitudes may be quite independent of one's reactions to portrayals of sex, which are, typically, highly impersonal. I believe that there are such grounds for regarding as undesirable changes in our attitudes towards sex produced by pornography, or for that matter by advertising, and for wanting to be able to avoid them. But, in addition to the problem of separability, just mentioned with regard to portrayals of violence, these grounds may be too close to the substantive issues in dispute to be an acceptable basis for the regulation of expression.

It seems, then, that an argument based on the need to protect unwilling audiences against being influenced could justify restriction of at most some forms of offensive expression. This leaves us with the residual question how much offense must be tolerated in order for persuasion and debate regarding sexual mores to go forward. Here the clearest arguments are by comparison with other categories of expression. The costs that audiences and bystanders are required to bear in order to provide for free political debate are generally quite high. These include very significant psychological costs, as the *Skokie* case indicates. Why should psychological costs

32. Here the moral status of attitudes and practices may become relevant. Moral considerations have been surprisingly absent from the main arguments for restricting pornography considered in this section: the notion of offense quite explicitly abstracts from moral appraisal, and the importance of being able to influence the future mores of one's society does not depend on the assumption that one's concern with these mores is based in morality. A person can have a serious and legitimate interest in preserving (or eliminating) certain customs even if these are matters of no *moral* significance. But morality is relevant to the argument for audience protection since, if sexual attitudes are a matter of morality, this indicates that they can be appraised on grounds that are independent of subjective reaction, thus providing a possible basis for claiming that a person who has come to have a certain attitude (and to be content with having it) has been made worse off.

of the particular kind occasioned by obscenity be treated differently (or given a particularly high value)? A low cost threshold would be understandable if the issues at stake were trivial ones, but by the would-be restrictors' own account this is not so. I do not find the prospect of increased exposure to offensive expression attractive, but it is difficult to construct a principled argument for restriction that is consistent with our policy towards other forms of expression and takes the most important arguments against pornography seriously.

HEINONLINE

Citation: 78 Nw. U. L. Rev. 1284 1983-1984

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Mon May 2 16:15:31 2011

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0029-3571](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0029-3571)

MUST SPEECH BE SPECIAL?

*Frederick Schauer**

Academic and judicial thinking about freedom of speech seems to have entered a new phase, one that might be called the "reemergence of theory." We are now experiencing an attention to the underlying premises of the principle of freedom of speech that is both more conscious and more sustained than at any time in the past. In order to explain this development, it is necessary to take a brief look at the phases that have preceded the current one. Obviously these phases overlap, and my characterizations represent rough generalizations rather than inviolate truths. Indeed, any such characterization is little more than the identification of one interesting feature from among a morass of interconnected similarities and differences. Thus, like most attempts to put the phenomena of the world into large generalizations, drawing these distinctions says much more about the draftsman than about the world. I plead guilty to the charge, but the contrasts seem nevertheless worthy of exploration.

From 1919 until about twenty years ago, discussion about freedom of speech in the context of the first amendment took place largely in the "How much?" mode. The courts and first amendment theorists commonly acknowledged, as Holmes put it, that the first amendment was not "intended to give immunity for every possible use of language."¹ Thus, the various exceptions to the coverage² of the first amendment—

* Cutler Professor of Law, College of William and Mary. Visiting Professor of Law (1983-1984), University of Michigan. A.B., M.B.A., Dartmouth College; J.D., Harvard University. Although this Article deals with a theme similar to that of the Review Essay by Professors Alexander and Horton that appears in this issue, Alexander & Horton, *The Impossibility of a Free Speech Principle*, 78 Nw. U.L. REV. 1319 (1983), I had not seen their review when this Article was written. I plan to respond to Professors Alexander and Horton at some later date.

¹ *Frohwerk v. United States*, 249 U.S. 204, 206 (1919).

² I use the word "coverage" to refer to those activities the regulation of which is to be measured against the standards of the first amendment. It is quite possible that certain conduct, even when measured against the standards of the first amendment, will remain unprotected. Yet the distinction between coverage and protection is designed to point out that there is a big difference between those activities (some of which are verbal) that have nothing to do with the first amendment, and those that at least require that governmental action be tested against relatively stringent first amendment standards. I have dealt with this distinction at great length elsewhere. F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 89-92, 134-35 (1982); Schauer, *Can Rights Be Abused?*, 31 PHIL. Q. 225 (1981); Schauer, *"Private" Speech and the "Private" Forum: Givhan v. Western Line School District*, 1979 SUP. CT. REV. 217, 227-29 [hereinafter cited as Schauer, *Private*].

commercial advertising,³ defamation,⁴ obscenity,⁵ and fighting words⁶—were rarely called into serious question. Moreover, even with respect to political and other speech that the first amendment plainly covered, the battle lines were narrowly drawn. No one doubted that free speech was a good thing, at least in the abstract, and consequently there was little concern for *why* free speech was valued. Instead the problems centered around the weight to be given freedom of speech when it conflicted with other universally acknowledged values, most commonly national security and public order.⁷ Although in retrospect it seems that this debate could have been illuminated by closer attention to the philosophical foundations of the principles of free speech, that was not the course taken. Rather, the tired metaphors of the marketplace of ideas and the search for truth served as stage props for a debate over how much the values of free speech would have to yield in the face of exigent public concerns.⁸

This is not to say that the issues present in this phase were easy. On the contrary, the judicial and academic divisions during this period of growth of free speech doctrine—roughly from 1919 to the mid-1960's—were as sharp as they have ever been.⁹ But the combatants

Speech]; Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 267-82 (1981) [hereinafter cited as Schauer, *Categories*].

³ *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

⁴ *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

⁵ *Roth v. United States*, 354 U.S. 476 (1957).

⁶ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

⁷ *E.g.*, *Dennis v. United States*, 341 U.S. 494 (1951); *Cox v. New Hampshire*, 312 U.S. 569 (1941).

⁸ *E.g.*, *Dennis v. United States*, 341 U.S. 494 (1951); *Schneider v. State*, 308 U.S. 147 (1939).

⁹ Many of these debates took place between the so-called "absolutists" and the so-called "balancers." *E.g.*, *Barenblatt v. United States*, 360 U.S. 109 (1959); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Frantz, The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); *Mendelsohn, On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962); *Meiklejohn, The Balancing of Self-Preservation Against Political Freedom*, 49 CALIF. L. REV. 4 (1961).

I suppose that characterizing an enormously complex range of issues in terms of a simple dichotomy between balancing and absolutism served a purpose in its time, but it has had the unfortunate consequence of continuing to channel debate about important first amendment issues into a preconceived mold of balancing versus absolutism, even among those who ought to know better. *E.g.*, *Baker, Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U. L. REV. 937 (1983); *Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983). For example, the simple designation of "balancing" masks questions about *who* should weigh competing values, the extent to which balancing should take place in more or less rigid rules or in the circumstances of the individual case (and that is a continuum and not a dichotomy), and the level of abstraction at which the competing values should be described and weighed. Similarly, absolutism may be taken to entail a narrowly circumscribed first amendment within which direct restrictions are prohibited, or it may be taken instead as a desire to formulate specific first amendment rules of adjudication that grant little if any power to the judge in the individual case to examine the state's particular reasons for restricting in that case, or to examine the extent to which

seemed relatively unconcerned with the deeper meaning of free speech. First amendment partisans took it as a given that maximum protection of free speech was a good thing,¹⁰ and devoted their efforts to arguing that the perceived dangers of speech were not nearly as great as was often assumed. And those who were wary of excess protection of speech were similarly unconcerned with the deep theory of the first amendment. They saw no reason to doubt the value of free speech in the abstract, but were unwilling in real cases to sacrifice many of their fears about dangers to security, order, and the stability of the state.¹¹

The 1960's and 1970's brought a new phase to free speech theory, a phase that substituted for the question "How much?" the seemingly simpler question of "How?" This was, of course, a period of intense solicitude for individual rights, and free speech was no exception. There was no call to examine the reasons for accepting the principle of free speech, for everyone agreed without question that maximum freedom of speech (and most other things as well) was desirable. As a result, most disputes focused on the strategies for achieving maximum protection.¹² This search for how to attain optimal free speech protection pervaded not only the academic commentary, but the work of the courts as well. For it was during this phase that those studying the first amendment witnessed the judicial creation of the various devices that have now become acknowledged weapons in the first amendment arsenal—vagueness,¹³ overbreadth,¹⁴ the chilling effect,¹⁵ special proce-

a particular speaker or speech is important in light of the principles of freedom of speech. This latter version of absolutism, focusing on restricting judicial power, is implicit in Baker's argument, and is quite different from the former version, which partially characterizes Meiklejohn's special concern with restricting legislative power.

That an absolutist-balancer dichotomy obscures important problems and variations is only part of the problem. Equally troublesome is the extent to which language from a former and largely different war is used to describe the battles of today. The language has acquired so much baggage from its previous usage that it blocks us from appreciating the ways in which today is different from yesterday. Cf. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897) (deploring the confusion caused when terms with ethical associations are used in legal discourse).

¹⁰ Indeed, for some the refusal to consider first principles was part of a belief that the first amendment itself had already resolved the question. *E.g.*, *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 56 (1961) (Black, J., dissenting).

¹¹ *E.g.*, *Dennis v. United States*, 341 U.S. 494, 561 (1951) (Jackson, J., concurring); *Feiner v. New York*, 340 U.S. 315 (1951); *Wigmore, Abrams v. U.S.: Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time*, 14 ILL. L. REV. 539 (1920). The tendency to accentuate dangers is somewhat related to another problem, that of being most willing to support freedom of speech as long as it takes place Somewhere Else. This view is not surprising, for in most of the interesting free speech disputes of recent times the litigants have been quite unpleasant people carrying equally unpleasant messages. See Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285, 286-87, 315-16.

¹² *E.g.*, T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); Kalven, "Uninhibited, Robust, and Wide-Open"—*A Note on Free Speech and the Warren Court*, 67 MICH. L. REV. 289 (1968); Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).

¹³ *E.g.*, *Smith v. Goguen*, 415 U.S. 566 (1974); *Keyishian v. Board of Regents*, 385 U.S. 589

dural protection,¹⁶ and many others. With free speech once again taken as a given in this search for methods of protecting it, there was, as in the previous phase, little occasion for concentrated attention on the "Why?" rather than the "How?" or the "How much?" of the first amendment.

From the foregoing two phases, a first amendment emerged that was, at its core, quite strong. Although perhaps it was not strong enough to satisfy those who exalt free speech above all other values, there is little doubt that *Brandenburg v. Ohio*,¹⁷ *New York Times Co. v. Sullivan*,¹⁸ and *Cohen v. California*¹⁹ represent a profound commitment to virtually unlimited discussion of political, moral, and social questions of all types.²⁰ Moreover, this strong core was well guarded by a host of procedural and subsidiary doctrines that seem to make it relatively safe from erosion.

From this secure core, arguments in the current phase of free speech theory have centered around the *broadening* of the first amendment. The most prominent example of the broadening of the first amendment is of course commercial advertising,²¹ but the same phenomenon exists with respect to campaign contributions,²² speech by public employees during working hours,²³ nude dancing,²⁴ and the choice by government of the books or entertainment that it will offer in

(1967). The vagueness doctrine, of course, is of rather more ancient lineage, e.g., *Winters v. New York*, 333 U.S. 507 (1948), thus making it an especially available tool somewhat later.

¹⁴ E.g., *Zwickler v. Koota*, 389 U.S. 241 (1967); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964).

¹⁵ E.g., *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Freedman v. Maryland*, 380 U.S. 51 (1965).

¹⁶ E.g., *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971) (burden of proof); *Freedman v. Maryland*, 380 U.S. 51 (1965) (burden of proof; promptness; availability of appeal); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (burden of proof).

¹⁷ 395 U.S. 444 (1969) (per curiam). *Brandenburg's* strength is best appreciated if assessed in light of *Hess v. Indiana*, 414 U.S. 105 (1973).

¹⁸ 376 U.S. 254 (1964).

¹⁹ 403 U.S. 15 (1971).

²⁰ The clearest indicator of the strength of the core of the first amendment today is the ease with which the Supreme Court has overturned content-based restrictions of speech that are related to public issues. E.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. 530 (1980); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). Indeed, the importance of discussion of "matters of public concern" is underscored by the Court's recent protection of the right to discuss those matters by an employee on a government employer's premises and time. *Connick v. Myers*, 103 S. Ct. 1684 (1983).

²¹ *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). On what counts as commercial speech, see *Bolger v. Youngs Drug Prods. Corp.*, 103 S. Ct. 2875 (1983).

²² *Buckley v. Valeo*, 424 U.S. 1 (1976).

²³ *Connick v. Myers*, 103 S. Ct. 1684 (1983). See also *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979).

²⁴ *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981). See also *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

its facilities.²⁵ In each of these areas, recent developments have made first amendment considerations applicable to issues that in the recent past were considered well without the boundaries of the first amendment. Moreover, for every instance of judicial broadening of the first amendment, there seem to be at least ten attempts in the academic literature to have the first amendment swallow up one more segment of society or of governmental action.²⁶

With this process of broadening, or at least arguing about broadening, has come the reemergence of theory. For although the accepted assumptions, traditional metaphors, and standard platitudes about the value of free speech might have been largely sufficient to deal with the issues of the past, they are clearly inadequate to confront the questions we must ask when trying to determine the extent to which, if at all, the courts should broaden the coverage of the first amendment to encompass a wide range of activities seemingly so far from the comprehension of the classical free speech theorists that the relevance of classical theory has become attenuated. In the place of the classical theories have come new attempts to ask about the "Why?" of the first amendment, in the hope of developing a theory that will explain the values that the concept of free speech is designed to serve. With such a theory in place, of course, it becomes much easier to confront the questions raised by the broadening of the first amendment. For if we know *why* we have the principles of free speech, then we can determine in the new case whether that class of activities is the type that the first amendment is designed to promote.

Would that it be so easy! The problem, of course, is that there are numerous candidates for the appropriate underlying theory of the free speech and free press clauses of the first amendment. Indeed, the concentration in this Symposium on deep theory, either explicitly or implicitly, is strong evidence of the way that debate about freedom of speech has shifted. In order to shed some light on the debate about the philosophical/sociological/political/historical foundations of free speech, it seems appropriate to set some ground rules, or at least some standards that an adequate theory must satisfy. Surprisingly, hardly any attention has been devoted to this task.²⁷ On second thought, it probably is not so surprising. Almost everyone would prefer being the star quarterback to being the referee or a member of the rules commit-

²⁵ Board of Educ., Island Trees Free Union School Dist. v. Pico, 457 U.S. 853 (1982) (plurality opinion); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

²⁶ E.g., Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979); Morgan, *The Constitutional Right to Know Why*, 17 HARV. C.R.-C.L. L. REV. 297 (1982). See also the fascinating analysis of sleeping as speech in *Community for Creative Non-Violence v. Watt*, 703 F.2d 586 (D.C. Cir. 1983).

²⁷ The most notable exception is Tribe, *Toward a Metatheory of Free Speech*, 10 SW. U.L. REV. 237 (1978).

tee. Yet if there were no rules, and no referees, there would be no star quarterbacks, so someone has to do the job, and that is part of what I want to accomplish here. But it is also too large a task to complete in this forum, so I want to concentrate on only part of it. I want to deal with the question of whether, and if so to what extent, an adequate theory of free speech must explain the way in which the activities encompassed by the first amendment are importantly distinct from activities that do not receive such uniquely cherished protection. In other words, must speech be special?

I

In asking whether speech is or must be special, we must start by clarifying the nature of the question. That is, no one could plausibly claim that the activities covered by the first amendment share no characteristics whatsoever with activities not covered by the first amendment. Rather, the claim I want to consider is more modest. Do the activities covered by the first amendment²⁸ possess at least one and maybe more theoretically relevant differences from those activities not so covered? If they do, then we can say that the activities covered by the first amendment are in some sense special. But if they do not—if they are an analytically indistinguishable subset of a larger category, not all of which is protected by the first amendment—then we can say that speech is not special.

The question of whether speech is special has a descriptive side and a normative side. On the descriptive side, the question is whether one can identify relevant differences between speech and activities not covered by the first amendment. But on the normative side, the question is whether such a difference is necessary for a satisfactory underlying theory of the first amendment. For it is by no means inconceivable, and indeed may very well be the case, that what is analytically necessary for a satisfactory theory of the first amendment is unattainable given the existing state of the world. Yet that is getting ahead of things. For the moment, it is sufficient to note that the question "Must speech be special?" is analytically distinct from the question "Is speech special?"

In dealing with these issues, I want to discuss one particular strand of free speech theory that presents the problems most starkly. This strand I will call the "self-development" theory, and I use that designation precisely because it is different from the titles of the various theories that I believe comprise it. I mean to include within the category

²⁸ Whether the "activities covered by the first amendment" are all "speech" in a non-technical sense is a crucially important question, but not germane to the instant discussion. The reader may assume that "activities covered by the first amendment" and "speech" in a technical sense are here used synonymously. See Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979).

those theories relying variously on self-realization,²⁹ self-fulfillment,³⁰ self-expression,³¹ and variants on the individual liberty core of all of these theories. Conversely, I mean to exclude from the category the leading consequentialist justifications for a principle of freedom of speech, including most prominently the search for truth/marketplace of ideas theories,³² the popular sovereignty/democratic process theories,³³ and the distrust of government theories.³⁴

There are important differences among the various theories that are components of the self-development strand of first amendment theory, and I do not want to suggest that they are little more than minor variations of each other. For present purposes, however, they do share significant similarities. One is that they are all based on the value to the individual of a regime in which free speech flourishes, and that this value to the individual is taken as an end in itself. These theories, therefore, although perhaps consequentialist with respect to the individual, are not premised on the value to society of permitting free speech. Rather the focus is on what free speech can do for the individual, either as speaker,³⁵ or as listener,³⁶ or both.

But the most striking feature of all of these self-development theories is that they identify as the value underlying the principle of freedom of speech a value that is not peculiar to speech. In every variant at issue the value that self-development theorists urge is a value that can undoubtedly be promoted by speech. Nevertheless, that same value can also be promoted by other activities that do not involve communication, and self-development theorists offer no particular reason why

²⁹ E.g., Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) [hereinafter cited as Redish, *Free Speech*]; Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646 (1982); Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678 (1982).

³⁰ E.g., T. EMERSON, *supra* note 12, at 6-7; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 578-79 (1978).

³¹ For a fuller description and critique of this whole range of theories, see F. SCHAUER, *supra* note 2, at 47-67.

³² E.g., J.S. MILL, *ON LIBERTY* ch. 2, in *ESSENTIAL WORKS OF JOHN STUART MILL* 268-304 (M. Lerner ed. 1961); J. MILTON, *AREOPAGITICA* (J.C. Suffolk ed. 1968). The leading judicial embodiments are *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *IBEW Local 501 v. NLRB*, 181 F.2d 34, 40 (2d Cir. 1950), *aff'd*, 341 U.S. 694 (1951) (L. Hand, J.).

³³ E.g., A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). See also H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* (1966); M. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983).

³⁴ E.g., F. SCHAUER, *supra* note 2, at 73-86; Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521.

³⁵ E.g., Baker, *supra* note 29; Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978).

³⁶ E.g., Redish, *supra* note 29.

communicative activities can serve the goal more completely or more frequently than other activities that are not in any significant sense communicative.³⁷

I want to illustrate this point from two different perspectives. First, we can look at those theories emphasizing in some way or another the self-expressive aspects of communicating.³⁸ Each of these theories relies on the fact that expressing one's self is an important component of individual liberty, and if we do not allow channels of self-expression then we will suffer accordingly. Now this is of course true, but the question is whether communicating serves any particularly special function in terms of self-expression.³⁹ I can also express myself in my attire, my occupation, my sexual activity and preferences, my residence, my hobbies and other recreations, and so on. The list is virtually endless, and that is exactly the point. Communicating is obviously a form of self-expression, but it is by no means the only form of self-expression, and it is by no means the form of self-expression that is most important to everyone. Thus, the argument from self-expression leads to the conclusion that all forms of self-expression are worthy of equivalent protection. As a result, it is impossible to distinguish an argument from self-expression as an argument for freedom of speech from an argument from self-expression as an argument for liberty in general.

The same conclusion follows if we focus not on the self-expression of the speaker, but rather on the self-fulfillment or self-realization of the speaker or listener—on the ways that speaking or listening to speech makes one a better, or fuller, or more satisfied, or more perfect person.⁴⁰ Again, I have no doubt that speech does indeed serve all of these functions. Yet once again there seems no reason to believe that communication serves these functions any better or more often than do non-communicative activities. For some people, self-realization lies in their occupation, their travels, their inner contemplation, or their family life. Communication, whether one is speaker or listener, is merely one of a myriad of activities that in some way promotes self-fulfillment or self-realization.

In the form just presented, therefore, the theories under discussion

³⁷ In one sense, of course, all actions are communicative, or at least those actions that are in one way or another perceived by someone else. But in this sense Pike's Peak, the Empire State Building, and a 1957 Ford are all communicative, for all can inspire thoughts in a viewer. But comprehending the notion of free speech will be even more hopeless than it already is unless we assume a specific intention by a human being to communicate some message to another human being. Even this may not help very much, but that is probably because of the pervasive difficulty that I suggest at the very end of this Article.

³⁸ *E.g.*, Baker, *supra* note 35; Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

³⁹ For a fuller elaboration of this point, see F. SCHAUER, *supra* note 2, at 50-52.

⁴⁰ *E.g.*, T. EMERSON, *supra* note 12, at 6-7; Redish, *supra* note 29.

provide the ideal vehicle for discussing whether it is necessary for a satisfactory theory of the first amendment that speech be in some way special. For under these theories and their variants, speech is not claimed to be special, or significantly distinguishable from the other activities that may also contribute to the value that provides the basis of the theory. If it is necessary to a satisfactory theory of the first amendment that some such distinguishing feature be provided, then all of these theories must be considered to be failures.

II

The *locus classicus* of objections to self-development theories is a paragraph in an article by Robert Bork⁴¹ in which Bork scrutinizes the claimed benefits from speech of "development of individual faculties and the achievement of pleasure."⁴² He finds both of these justifications wanting for precisely the reason that I am discussing here:

[T]he important point is that these benefits do not distinguish speech from any other human activity. An individual may develop his faculties or derive pleasure from trading on the stock market, following his profession as a river port pilot, working as a barmaid, engaging in sexual activity, playing tennis, rigging prices or in any of thousands of other endeavors. Speech with only the first two benefits can be preferred to other activities only by ranking forms of personal gratification. These functions or benefits of speech are, therefore, to the principled judge, indistinguishable from the functions or benefits of all other human activity. He cannot, on neutral grounds, choose to protect speech that has only these functions more than he protects any other claimed freedom.⁴³

This argument draws its significance from the fact that the first amendment protects speech more than it protects non-speech conduct.⁴⁴ Without this contrast the first amendment serves no function. To the extent that the argument from self-development in all of its

⁴¹ Bork, *supra* note 33. Expressing sympathy with part of Bork's article, as I am about to do in the text, runs a great risk of confusion, owing to the fact that Bork's article contains an enormous number of highly contested points of constitutional theory. For a taste of the dispute, see, e.g., Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981). I find guilt by association quite deplorable in academic discourse, but let me make it clear that I do not mean to be taken as dealing with or expressing sympathy with any of Bork's theory except the particular point quoted below.

⁴² Bork, *supra* note 33, at 25. This is Bork's characterization of the first two of the four values underlying free speech as set forth by Justice Brandeis in *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (*Whitney* was later overruled in *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969)).

⁴³ Bork, *supra* note 33, at 25. The references to the "principled judge" and "neutral grounds" relate to Bork's full theory of constitutional adjudication and are not under discussion here. See *supra* note 41.

⁴⁴ I use "non-speech conduct" to refer to activities not covered by the first amendment. The contrast between the amount of protection given within the first amendment and that given outside it is nowhere presented more clearly than in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

forms collapses into an argument for general liberty, then no argument has been presented for a principle of free speech that is stronger than a general principle of personal liberty. Because in American constitutional doctrine we protect personal liberty only by application of the minimal scrutiny of the rational basis standard,⁴⁵ a justification that fails to distinguish the activities protected by the stringent standard of the first amendment from the activities protected by the minimal scrutiny of the rational basis test has failed in its task of explaining the protection of freedom of speech under the first amendment.

III

Now that I have presented the issue, I want to step away from the Constitution for a moment. Thus, I will first consider the argument against self-development as a question of social and political philosophy, completely divorced from any questions about American law in general or the first amendment in particular. This will provide the appropriate background for then turning to the argument as a question under the first amendment. I consider the two questions to be separate, and therefore consider them separately, because there is a point in having a written, authoritative constitution. Moreover, the authoritative nature of a written constitution makes it possible that an answer generated by ideal political theory will be unsupportable in the constitutional text, and indeed possibly even inconsistent with it.⁴⁶ In these cases, it is the duty of the judge to refrain from doing what is foreclosed by the text, even if that judge's own view of ideal political theory might lead to the opposite result.⁴⁷

As a question of social and political philosophy, the argument against the adoption of the self-development principle is premised on a point about the nature of moral and practical reason. If a specific principle is generated by a broader principle, and if we accept the broader principle, then we must, at the risk of self-contradiction, accept every other specific principle also generated by the broader principle, unless we can give particular and articulated reasons for drawing a distinction.⁴⁸ If we accept *X*, and if *X* generates *a*, *b*, and *c*, then we must be

⁴⁵ *E.g.*, *Doe v. Commonwealth's Attorney*, 425 U.S. 901 (1976) (per curiam); *Hollenbaugh v. Carnegie Free Library*, 439 U.S. 1052 (1978); *Kelley v. Johnson*, 425 U.S. 238 (1976); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

⁴⁶ I am here presupposing a by no means uncontroversial point of constitutional theory, but this is not the place to present a full theory of constitutional adjudication. For the constitutional theory that (in part) undergirds the views presented here, see Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797 (1982).

⁴⁷ See Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353 (1981). See also J. ELY, *DEMOCRACY AND DISTRUST* (1980).

⁴⁸ For a more extensive discussion, see F. SCHAUER, *supra* note 2, at 3-12.

willing, if we are to act rationally, to accept *a*, *b*, and *c*, and not just the one or two of those that happen to strike our fancy at the moment.

In the context of the principle of freedom of speech, then, if we say that we value free speech because it is a form of self-development, and if we accept self-development as a given, then, if we have not justified any qualification, we must be willing to protect every form of self-development as much as we protect speech. Yet many forms of self-development, as I am using that term, can cause harm to other individuals or to society in general. It would be implausible to suppose that the state is or could be significantly disabled to prevent harms merely because the cause of those harms was, in the process, engaged in self-expression, self-fulfillment, or self-realization. Thus we acknowledge that, in general, the prevention of harm is a proper function of the state, regardless of how nice the causing of harm may make someone feel.

But if speech is merely one category within the larger universe of self-developing actions, then it would seem, again to be consistent, that we would have to accept the principle that speech may be restricted when it causes harm to others. Yet then what is the point of a principle of free speech? Many communicative acts, including many that our pre-theoretical understanding of the nature of free speech would lead us to want to protect, have the capacity for causing significant harm to others or to society in general. Indeed, if I may return to American constitutional law for a moment, it is hard to think of any first amendment case in which the communicative acts at issue did not cause some degree of harm, or at least offense.⁴⁹ The anguish caused by the Nazis in Skokie,⁵⁰ the offense and annoyance of Cohen's jacket⁵¹ and Cantwell's phonograph,⁵² the damage to Damron's reputation and career,⁵³ the economic losses of even the innocent merchants of Claiborne

⁴⁹ Offense now seems to have settled in as a recognized harm under the first amendment. *E.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Nevertheless, the question of whether offense should be treated as a cognizable harm under the first amendment is by no means beyond dispute. Compare *Feinberg, Pornography and the Criminal Law*, 40 U. PITT. L. REV. 567 (1979) with *Schauer, Response: Pornography and the First Amendment*, 40 U. PITT. L. REV. 605 (1979).

The very fact that we can still debate about offense in the first amendment context underscores the point in the text, because there is no question that, outside of the first amendment context, a large variety of actions that are merely offensive can be controlled by government. Even though some may argue that offense is still far too often used as an improper basis for governmental regulation, *e.g.*, D. RICHARDS, *SEX, DRUGS, DEATH, AND THE LAW* (1982), there is still no question that offensive smells can be regulated, and so too in general can unsightly buildings, etc. See *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981).

⁵⁰ *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *stay denied*, 436 U.S. 953, *cert. denied*, 439 U.S. 916 (1978).

⁵¹ *Cohen v. California*, 403 U.S. 15 (1971).

⁵² *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

⁵³ *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971).

County,⁵⁴ the distortion of the election process by money or misleading promises,⁵⁵ and the humiliation caused by publicity about the victim of a sex offense⁵⁶ are but a small sample of instances in which the principle of freedom of speech is understood to prevent the government from intervening to deal with the kinds of harm that are normally taken to be sufficient to justify use of the state's coercive powers.

Thus, we want to protect speech not because it causes no harm, but *despite* the harm it may cause.⁵⁷ Our search for a justification, therefore, is a search for a reason to distinguish speech from the entire range of intentional actions. This is exactly the distinction that the various arguments from self-development fail to provide. As a result, these arguments tell us why we should protect liberty in general, but in the process they also become arguments for giving speech no greater protection than that given to the full range of other intentional actions. As a question of social and political theory, therefore, the arguments from self-development fail to provide a reason for recognizing a principle that grants greater protection for speech against state intervention than it grants to anything else the individual might wish to do.

IV

Let us now turn from abstract political theory, and attempt to look at this question as one arising in the attempt to formulate a theory of *this*⁵⁸ Constitution's first amendment. In order to do this, we must rely on the notion of principled adjudication. Unfortunately, however, the idea of principled adjudication, or of neutral principles,⁵⁹ has been the subject of so much redefinition and misinterpretation that I would like to use an alternative term, confessing in the process that this term merely reflects an idea already well-established in the literature,⁶⁰ if only one is willing to wade through all the drivel.⁶¹

⁵⁴ NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

⁵⁵ Brown v. Hartlage, 456 U.S. 45 (1982); Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981).

⁵⁶ Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

⁵⁷ See Schauer, *supra* note 49.

⁵⁸ See Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. FLA. L. REV. 209 (1983).

⁵⁹ Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). See also Bork, *supra* note 33. The notion, in some form or another, has made its way into the jargon of the Supreme Court. *E.g.*, Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481, (1983) (O'Connor, J., dissenting). For a broadside attack, see Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

⁶⁰ See Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35 (1963); Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978).

⁶¹ Unfortunately, I do not have the nerve to supply references for the characterization made in the text.

Thus, I want to refer to the notion of *articulate consistency*.⁶² This term is designed to emphasize that we are dealing with a question of consistency and not of the rightness or wrongness of principles, and that the particular notion at issue is largely controlled by the way that a court chooses to articulate its reasons for a decision. The constraint of articulate consistency suggests that when we justify a decision by reference to a principle (or a reason, rule, standard, justification, or theory) we must be willing to apply the principle, as articulated in the first decision, to all cases coming within the verbal description of that principle. When a court provides, without qualification, a reason for its decision, it must be willing to apply that reason in future cases, absent particularly strong reasons to the contrary.⁶³ The key feature of articulate consistency is the way in which it is normatively neutral, or procedural. The requirements of articulate consistency can apply to good reasons, bad reasons, or reasons totally unjustified by the judicial role. If a court sticks to what it says, if it is willing to take seriously its own statements,⁶⁴ then it has satisfied the requirements of articulate consistency. And this is no less true if the original reasons or justifications are wrong, outrageous, or whatever.

We can see, therefore, that the court in the first case has a great deal of control over how much of a constraint the notion of articulate consistency is going to be. If the court in the first case justifies its decision by a very narrow principle, festooned with caveats, qualifications, and exceptions, then it is unlikely that the constraint of articulate consistency will be a significant barrier to what the court decides to do in the next case.⁶⁵ On the other hand, if the court in the first case justifies its decision by a broad and generally unqualified principle, then the

⁶² After imagining that I was the first to use this term, I discovered that it had been used previously by Ronald Dworkin. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 88 (1977). My use is quite similar to his, and I have been unable to come up with an acceptable alternative, so I will forfeit my claim to originality, if not to independent creation.

⁶³ That is, most of the constraints on adjudication, including this one, are presumptive rather than absolute. Yet the creation of a presumption in place of a clean slate is still a significant change. On the less than absolute nature of the neutral principles constraint, see Greenawalt, *supra* note 60, at 1007-08. Cf. R. DWORKIN, *supra* note 62, at 110-15 ("gravitational force" of precedent).

⁶⁴ See Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979). See also Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467; Monaghan, *supra* note 47, at 387-91; Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029 (1977); Schauer, *supra* note 46, at 829. For the Supreme Court's most recent dispute about the weight to be given to its precedents, see the various opinions in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481 (1983).

⁶⁵ The difficulty, of course, is that a highly qualified opinion will provide little if any guidance to lower courts as they attempt to follow the Supreme Court. One wonders at times whether the Court does not pay too little attention to this "guidance" function. See Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C.L. REV. 745 (1983); Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 807-11 (1982); Schauer, *Private Speech*, *supra* note 2, at 217-18.

necessity of remaining faithful to this principle will exercise a substantial constraint on future decisions. Thus, the extent to which a principle applies in future cases is controlled by the justification that the court has provided in the first case.

We can now return to the principle of free speech, for it is the notion of articulate consistency that provides the link between the points made in the previous section and the same issue in the context of constitutional law. If a court says that it is protecting act x under the first amendment because x is an instance of self-expression, self-fulfillment, or self-realization, and the first amendment protects self-expression, self-fulfillment, or self-realization, then the court must be willing to apply that same principle in future cases. But since any intentional action can and usually is an instance of self-expression, self-fulfillment, or self-realization, then the constraints of articulate consistency would require the court to protect all intentional actions under the first amendment. The court, to be consistent, must be willing to apply the reason given in the first case to subsequent cases fitting within the description of the principle. If the principle is described merely as self-expression, then the first amendment must protect all self-expressive actions. Yet of course it is not true that all self-expressive actions are protected by the first amendment,⁶⁶ or even by any other part of the Constitution.⁶⁷ Thus, the problem with the entire range of self-development justifications for the first amendment is that they fail the test of articulate consistency. Without more, they offer a rationale that is far broader than we are willing to accept, which if consistently applied would protect almost all activities to the same extent that we protect certain communicative activities. Because we are unwilling to do this, these justifications might just as well not have been mentioned at all. A reason we are not willing to follow is no reason at all.

V

I noted in Section III that there was a point in having written and authoritative constitutions, or at least that an authoritative constitution must be taken as such. In order to be faithful to this conviction, I must deal with the textual response to the arguments I have just presented.⁶⁸ Thus, it is freedom of speech and press, and not freedom of liberty in general, that is specifically set forth in the text for special protection. Even if the justification would, to be fully consistent, have to be applied to a far wider range of cases, only part of this range is picked out by the constitutional text for special attention. The reason we do not apply the self-development arguments to their full reach is that we lack the

⁶⁶ See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

⁶⁷ *Kelley v. Johnson*, 425 U.S. 238 (1976).

⁶⁸ See especially Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

constitutional mandate for so doing. Because we have that mandate in the case of speech, we can proceed to apply that justification in speech cases. The relevant distinction under this argument—what makes speech special—is the very fact that the constitutional text says it is.

One might call this the argument from coincidence. Even if there is no good reason for treating speech specially, the text says we must, and that is sufficient to justify the special protection for speech. And to the extent that the text is clear, we cannot legitimately avoid it. Thus, there may be no completely justifiable reason for limiting the presidency to those thirty-five years old or older,⁶⁹ or for giving equal representation in the Senate to Delaware and California,⁷⁰ but these are the mandates from the text, so we follow them. And so too, picking out speech for special treatment is the mandate from the text, and that's that. Speech is special by stipulation, even though now the stipulation may seem a bit odd.

But this loses sight of why we are looking at justifications at all. The very reason we are concerned about the underlying theoretical justification for the principle of freedom of speech, in a way that we are not with respect to the age of the presidency and equal representation in the Senate,⁷¹ is that the text is not clear,⁷² and we are therefore required to work out a theory of free speech so that we can intelligently apply the vague words of the document.⁷³ The argument from coincidence is therefore circular. It calls upon us to note the presence of speech and not action in general in the text, but it is the very unclarity of the text that is the impetus for the entire enterprise. If we assume we cannot have a literal interpretation of the first amendment,⁷⁴ then we

⁶⁹ U.S. CONST. art. II, § 1, cl. 6.

⁷⁰ U.S. CONST. art. I, § 3, cl. 1; U.S. CONST. art. 5.

⁷¹ It is incorrect to say that we are not concerned about justifications for, say, the age requirement because the issues do not arise. The very reason they do not arise is that the text is clear. If article II specified merely that the President had to be of "sufficient maturity", there would be frequently litigated controversies over that phrase (unless it was deemed a political question), and consequent great concern with underlying purpose and theory.

⁷² For many years those sympathetic to a strong first amendment were influenced by the view of Justice Black that the first amendment was plain and unequivocal. See, e.g., *Barenblatt v. United States*, 360 U.S. 109, 134 (Black, J., dissenting); *Smith v. California*, 361 U.S. 147, 155 (1959) (Black, J., concurring); *Street v. New York*, 394 U.S. 576, 609 (1969) (Black, J., dissenting). Fortunately, we have now been released from the shackles of literalism, and we understand the way in which the text of the first amendment is importantly vague. See, e.g., Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RESEARCH J. 645, 731; Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107, 110-28 (1982). See also Schauer, *Categories*, *supra* note 2, at 267-68; Schauer, *supra* note 28, at 902-05. An intriguing analysis is found in Note, *The Speech and Press Clauses of the First Amendment as Ordinary Language*, 87 HARV. L. REV. 374 (1973).

⁷³ Obviously, my reference to "working out a theory" presupposes an approach that treats the free speech and other similar constitutional clauses as more or less discrete units of analysis, and, more importantly, places no great weight on the specific or general intentions of the drafters. See Schauer, *supra* note 46.

⁷⁴ This assumption can take two forms. First, it can be a conclusion from the vague and

must interpret it in light of some underlying purpose or theory. But if that underlying theory says nothing in particular about speech, if it does not set speech apart from a vast range of other conduct, then there is no principled stopping point after we leave the domain of what is very specifically and unequivocally mentioned in the text. To put it bluntly, the argument from coincidence might support applying the first amendment to all self-expressive or self-fulfilling instances of *speech* (taken literally) or *press* (taken literally), but the argument is of no assistance if we are trying to figure out why or how to apply the first amendment to oil paintings and handwritten manuscripts but not to nude bathing or riding a motorcycle without a safety helmet.⁷⁵

VI

I now want to consider an alternative response to the argument

equivocal language of the text. See *supra* note 72. See also J. ELY, *supra* note 47, at 105; Mendelson, *supra* note 9, at 821. On the other hand, it can also flow from what Professor Van Alstyne calls the "irresistible counterexample." Van Alstyne, *supra* note 72, at 113. Even if the language were both literal and absolute, which it clearly is not, it is inconceivable that certain "speech" activities, whether perjury, price-fixing, extortion, ordinary solicitation to ordinary crimes, face-to-face fraud, or the making of representations about securities, could be considered exempt from governmental regulation. This latter approach can be characterized as "The Constitution does not mean what it says." The former can be characterized as "The Constitution means what it says, but it says less than you think." In terms of general fidelity to the notion of a written, authoritative, constitution, this last-mentioned approach has significant advantages. Fortunately, it is also justified by the text.

⁷⁵ Another possibility, of course, is to take the references to "speech" and "press" as little more than quaint anachronisms, and then proceed to use the first amendment as the vehicle for protecting an enormous range of individual, non-communicative conduct. See Baker, *supra* note 35, at 964. Less explicit hints at the same perspective are in L. TRIBE, *supra* note 30, at 938-90. Tribe refers to the first amendment throughout his discussion of various forms of expression of "personhood," but he is rarely explicit about which constitutional provision protects which activity.

Apart from the difficulties I have with treating the constitutional text so casually, there is still the more important problem of justifying an exemption for speech in those circumstances in which it causes a clear harm. Suppose we change the facts of *New York Times v. Sullivan*, 376 U.S. 254 (1964), slightly. That is, suppose that the authors of the advertisement, negligently and erroneously but in good faith, charged in the advertisement that Sullivan had served two years in jail for embezzlement. Suppose as well that as a result of this Sullivan loses the next election, cannot get another job, and winds up on the steps of the Salvation Army as a derelict. Clearly there are some intervening causes here, but it is also plain that the negligent and erroneous but not intentional falsity has served as a "but for" cause of Sullivan's downfall. In these circumstances the *New York Times* and the authors of the advertisement would still prevail under the rule of *New York Times*. But would we be comfortable if someone's non-communicative and non-political but self-expressive embodiment of their personhood negligently caused an equivalent harm? I think not, and I think we would have no problem in wanting to impose liability. I would imagine, for example, that many motorcyclists not only feel that they can better express their personhood without a helmet than with one, but also that they can better express their personhood at eighty miles an hour than at fifty-five. Are they responsible for the harms they negligently cause when riding at eighty? I hope so. Are newspapers responsible for negligently causing harms of the same magnitude? No. See *Ocala Star-Banner v. Damron*, 401 U.S. 295 (1971).

that we must reject self-development justifications for freedom of speech because they do not set speech apart from the entire range of intentional actions. Under this alternative response, presented at one time or another by several of the participants in this Symposium,⁷⁶ there might be reasons why *speech* relating to or causing self-expression, self-fulfillment, or self-realization might be more important than other forms of conduct relating to or causing self-expression, self-fulfillment, or self-realization.⁷⁷ Alternatively, there might be greater danger in regulating the communicative aspects of, say, self-expression than in regulating the non-communicative aspects of self-expression.⁷⁸

I have no desire whatsoever to refute any of these arguments, because these arguments, unlike the argument from coincidence, acknowledge the very point at issue. Indeed, they do more than acknowledge it, they concede it; for the qualifications about speech being a more important form of self-expression, or about the regulation of speech-related self-expression being particularly dangerous, are concessions of the very point under dispute. If there is some reason to treat self-expressive speech differently from other forms of self-expressive activities (and the same would apply to activities that foster self-fulfillment or self-realization), then that reason becomes part of the underlying theoretical justification for the first amendment. In other words, a reason has just been given for treating speech specially.

When we combine a general justification, such as self-expression, with a specifically articulated qualification, as in the arguments now being discussed, the underlying justification for the principle of freedom of speech might be complex rather than simple. This, of course, is not in itself a problem. Indeed, general justifications are likely to become so general that they are of little if any assistance in helping us to decide actual cases.⁷⁹ Nevertheless, if we are to use this more complex underlying theory to help us reach a decision in a hard case, we must use the entire justification and not only part of it. That is, we would have to look not only for the presence or absence of self-development factors, but also for the presence or absence of those factors that lead us to treat speech as a particularly important and special subset of self-development in general.

For my own part, I happen to believe that if we look closely at these distinguishing factors, we will find sufficient dangers in govern-

⁷⁶ Greenawalt, *supra* note 72, at 734 n.344; Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U.L. REV. 1137, 1154 (1983); Shiffrin, *supra* note 9, at 1238-39. Perry's "epistemic value" seems responsive to some of the concerns I am expressing, but I question whether the response is successful. In other words, is the epistemic value sufficiently different from or narrower than the various self-realization values so that it does not present the same problems I am raising here?

⁷⁷ Greenawalt, *supra* note 72, at 734 n.344.

⁷⁸ *Id.*

⁷⁹ For a fuller discussion, see Schauer, *supra* note 11, at 311-12.

ment regulation of a wide range of communication—dangers different in kind and degree from government regulation of other activities—to justify a principle of freedom of speech without having to resort to notions of self-expression, self-fulfillment, or self-realization. To me the dangers of excess governmental regulation are a self-sufficient justification.⁸⁰ I may be wrong in this. The point, however, is that if some such reason is either self-sufficient or supplementary, it is still a reason for treating speech specially.

VII

Although the foregoing discussion has taken place in the context of self-development values that are argued to provide the foundations for the principle of free speech, the self-development justification is offered merely as an example of the larger question of the extent to which speech is or must be special. When I claim that a principle of free speech is “independent,”⁸¹ therefore, I am not claiming that the principle is or can be entirely self-standing. Nor do I claim that free speech is an end in itself,⁸² or an ultimate, irreducible value, although I do believe that ultimate irreducible values exist.⁸³ Thus, free speech, perhaps because it is so counter-intuitive⁸⁴ in protecting a wide panoply of

⁸⁰ F. SCHAUER, *supra* note 2, at 80-86.

⁸¹ *Id.* at 3-7. See Perry, *supra* note 76, at 1154 n.72.

⁸² See Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 880 (1963). There is an unfortunate tendency to say that everything that is valued for non-utilitarian or anti-utilitarian reasons is a “good in itself.” Yet such a statement confuses utilitarianism with any talk of causes and conditions. That is, there may be certain primary personal goods, perhaps such as autonomy and liberty. It may also be that a certain deontological, anti-utilitarian theory holds that individual liberty and autonomy should be protected even at the expense of the general public welfare. It also may be that certain conditions, such as freedom of speech, are *conducive* to autonomy and liberty. In these circumstances it would be erroneous to say that free speech is a “good in itself,” because it is good for what it does, or what it leads to, and not what it is. It is possible that free speech may under some theories be a component of a primary good such as liberty or autonomy, and in this case we would be more warranted in saying that it was a good in itself. Nevertheless, the point is that speech or free speech can be merely instrumental with respect to certain individual primary goods, and still be a component of an anti-utilitarian theory.

⁸³ See I. BERLIN, *CONCEPTS AND CATEGORIES: PHILOSOPHICAL ESSAYS* (1978); Williams, *Ethical Consistency*, in *PROBLEMS OF THE SELF* 166 (1973). Thus, I have considerable sympathy for what Rawls refers to as “intuitionism.” J. RAWLS, *A THEORY OF JUSTICE* 34 (1971). See Feinberg, *Rawls and Intuitionism*, in *READING RAWLS: CRITICAL STUDIES ON RAWLS’ A THEORY OF JUSTICE* 108 (N. Daniels ed. 1975).

⁸⁴ See Emerson, *supra* note 82, at 887-900. Because Emerson’s distinction between expression and action has not stood the tests of either time or close scrutiny, see, e.g., L. TRIBE, *supra* note 30, at 579, 598-601; Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Yacavone, *Emerson’s Distinction*, 6 CONN. L. REV. 49 (1973), there is an unfortunate tendency to discount the remainder of his contributions to free speech theory. But we should not allow the sneers of the contemporary cognoscente to distract us from recognizing Emerson’s profoundly important insights regarding the counter-intuitive nature of the principles of free speech, and the importance of designing not only principles, but institutions, to accommodate and compensate for this factor. Unless we recognize, as

harmful and obnoxious activities, must especially be justified by reference to some other, presumably more fundamental, principle or principles.

When we engage in the process of searching for these more fundamental principles, we must, as I have argued,⁸⁵ be willing to accept all of the conclusions that follow from acceptance of the more fundamental principle, or provide some distinction between speech and the other activities generated by the principle. If we justify free speech by reference to a principle of democracy,⁸⁶ or some broader principle or scheme of political liberty,⁸⁷ for example, then we must be willing to accept not only a principle of free speech, but also those other more specific principles that follow from a general principle of democracy or political liberty. In fact we do precisely that, because we protect voting and other activities related to the process of government as strongly as we protect freedom of speech,⁸⁸ albeit in different ways and with different doctrines. An argument based on democracy, therefore, even without any further qualifications, satisfies the constraint of articulate consistency in a way that an argument from self-expression *simpliciter* does not.

Thus, we cannot distinguish free speech, or speech itself, from all other activities. That is undoubtedly impossible.⁸⁹ It nevertheless remains crucial that we treat freedom of speech as being independent from general liberty, because of two interrelated problems. First, we want to protect speech *more* than we protect many other activities that are part of some conception of general liberty. For example, we want to protect speech more than we protect economic activity, although under some theories economic activity is an important and perhaps even central part of liberty in general.⁹⁰ We also want to protect free speech more than we want to protect a wide range of non-communicative

Emerson has forced us to do, that freedom of speech is a fragile value, and one whose protection is likely to focus on the crackpots and ideological dregs who are the most common litigants in first amendment cases, we will make little progress in designing doctrines and institutions sufficient to the task.

⁸⁵ See *supra* text accompanying notes 46-47.

⁸⁶ E.g., A. MEIKLEJOHN, *supra* note 33; Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191. See also Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

⁸⁷ See Rawls, *The Basic Liberties and Their Priority*, in 3 THE TANNER LECTURES ON HUMAN VALUES 1 (S. McMurrin ed. 1982).

⁸⁸ In some instances we do so by explicit textual commitment. E.g., U.S. CONST. amends. XV, XVII, XIX, XXIV, XXVI. In other instances we use interpretation of broader constitutional provisions. E.g., *Reynolds v. Sims*, 377 U.S. 533 (1964). At times we construct entire theories. E.g., J. ELY, *supra* note 47.

⁸⁹ See Perry, *supra* note 76, at 1185.

⁹⁰ E.g., F. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960); R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

tive lifestyle choices, although once again these choices are to some an important component of liberty in general.⁹¹ The second point, inseparable from the first, is that we are unwilling to disable ourselves from dealing with harmful, offensive, obnoxious, dangerous behavior in general in the way that we are with reference to speech.

Thus there exists in current free speech doctrine a difference in both the type and probability of harms that will justify government intervention. Harms that are sufficient outside the coverage of the first amendment are non-cognizable within the coverage of the first amendment; and even with respect to harms that are entitled to consideration both inside and outside the first amendment, the first amendment requires a likelihood of harm much higher than we otherwise require.⁹² It is this difference that is in need of theoretical justification, at least as we continue to contemplate broadening the first amendment, and thus it is important to see why speech might be special with respect to general liberty. Fortunately, this is an easier task than trying to see if speech is special *simpliciter*, but that does not mean that we have already achieved success.

VIII

In searching for an underlying theoretical justification for the principle of freedom of speech, it is possible that we will find a number of different justifications. Although some theories are indeed unitary,⁹³ and although there need not be anything inherently wrong with a unitary theory, so, too, there need not be anything wrong with a multi-valued theory.

When I refer to a multi-valued theory of the first amendment, I am actually including two different types of multi-valued theories. One type views the language of the free speech and free press clauses of the first amendment as the umbrella under which are located a number of more or less distinct separate principles, each with its own justification, and each directed towards a separate group of problems. Under such a view, for which I acknowledge considerable sympathy,⁹⁴ we might in fact have several first amendments. We might have one first amendment directed primarily to the problem of government suppression of its critics. The justifications for this first amendment might be largely of the democratic theory⁹⁵ and abuse of governmental power⁹⁶ vari-

⁹¹ See Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 113 (S. Hampshire ed. 1978).

⁹² Compare the standard of likelihood in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), with the "unprovable assumption" theme in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

⁹³ E.g., Perry, *supra* note 76; Redish, *Free Speech*, *supra* note 29.

⁹⁴ See Schauer, *supra* note 11, at 313.

⁹⁵ See *supra* note 33.

⁹⁶ See *supra* note 34.

eties, and this first amendment might be the one that is most applicable to cases such as *New York Times Co. v. Sullivan*,⁹⁷ *NAACP v. Claiborne Hardware Co.*,⁹⁸ and *United States v. Grace*,⁹⁹ just to take one famous and two recent examples. Another first amendment might be directed primarily towards the problem of open inquiry in the sciences and at academic institutions, being based primarily on the heritage of Galileo and the search for truth/marketplace of ideas justifications for the principle of free speech.¹⁰⁰ Perhaps this is the first amendment, albeit with some overlap with the one mentioned previously, that lurks around cases such as *Sweezy v. New Hampshire*¹⁰¹ and *Board of Education, Island Trees Free Union School District v. Pico*.¹⁰² A third first amendment might be a reaction to an excess of historical censorship of the arts,¹⁰³ leading to cases such as *Southeastern Promotions, Ltd. v. Conrad*¹⁰⁴ and *Jenkins v. Georgia*,¹⁰⁵ and perhaps even based in part on notions of self-realization. This list of possible first amendments is of course representative rather than exhaustive, but I think I have made the point.

Alternatively, the other variety of multi-valued theory might say that speech represents a unique mix of various different characteristics, not duplicated in other human endeavors.¹⁰⁶ This unique mix of self-expression, self-realization, capacity for influencing political change, and so on, is then said to justify special protection for speech. This is by no means an implausible view, but it seems somewhat sticky in application, at least at the margin. That is, what do we do when we are unsure of first amendment coverage in a close case? I suspect that here it would be futile to inquire into whether this instance presents the same kind of unique mix of characteristics that justifies the special pro-

⁹⁷ 376 U.S. 254 (1964).

⁹⁸ 458 U.S. 886 (1982).

⁹⁹ 103 S. Ct. 1702 (1983).

¹⁰⁰ See *supra* note 32.

¹⁰¹ 354 U.S. 234 (1957). I pick *Sweezy* because it concerns speech in the classroom, albeit indirectly, but still in contrast with all of the supposed "academic freedom" cases that in fact involve merely the free speech rights of public employees, on their own time, some of whom coincidentally happen to be teachers. See Schauer, *Private Speech*, *supra* note 2, at 242-49. These issues were raised but ultimately not decided in *Princeton Univ. v. Schmid*, 455 U.S. 100 (1982) (*per curiam*) (dismissing appeal for mootness, lack of standing, and absence of article III jurisdiction).

¹⁰² 457 U.S. 853 (1982) (plurality opinion).

¹⁰³ I use "historical" not in the sense of a problem that was perceived as significant by the framers, or even at that time, but rather in the sense of a problem that the Court has perceived as having been a problem in the past. Thus, the rigidity of current standards for obscenity, *Miller v. California*, 413 U.S. 15 (1973); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Pinkus v. United States*, 436 U.S. 293 (1978), is likely a reaction to the extremes of the nineteenth and first half of the twentieth centuries, and not to problems identified as such, or even existing, in the eighteenth century.

¹⁰⁴ 420 U.S. 546 (1975).

¹⁰⁵ 418 U.S. 153 (1974).

¹⁰⁶ E.g., Shiffrin, *supra* note 9, at 1238-39.

tection of speech.¹⁰⁷ Rather, we would look at the particular components of that mix that were present in the case at hand, and when that happens this second type of multi-valued theory collapses into the first.

IX

Earlier I drew the distinction between abstract political theory and constitutional interpretation.¹⁰⁸ Although it is a hotly contested point of constitutional theory,¹⁰⁹ at least all of the participants in this Symposium subscribe to the view that the development of constitutional principles need not be based solely on the dictionary definition of the words in the text,¹¹⁰ nor on the specific understandings of those who drafted the provisions at issue. Thus, the task of the courts, in attempting to interpret the open-ended and morally loaded constitutional provisions—freedom of speech, equal protection, cruel and unusual punishment, and so on—is to develop a theory of these clauses, a theory that will be significantly philosophical but will include a large dose of precedent.¹¹¹

When we are engaged in theory construction in this sense, we can proceed in alternative ways. One approach is to attempt to work out an ideal political theory independent of the particular constitutional provision at issue, such as freedom of speech, and then proceed to apply that clause to the extent that it supports that theory. I have little sympathy for this approach, in large part because its chief analytical tool seems to be the shoehorn. To the extent that the text does not fit the preconceived theory, then a little pushing and pulling, huffing and puffing, bending and slicing, and—*voilà*—one's preconstructed political theory just happens to be embodied in the Constitution, with nothing left out.¹¹²

An alternative approach, and one much more consistent with my vision of constitutionalism, is one that starts with the particular clause as the mandate for building a narrow theory of *that clause*. We start with freedom of speech, for example, because freedom of speech is

¹⁰⁷ It is possible, of course, that we might create a rule based on a certain general mix of characteristics, and then, like most rules, apply it more or less mechanically without determining whether this particular instance does or does not fit the underlying theory of the rule. That perception, however, does not apply to this inquiry, in which, by stipulation, we are dealing with those close instances that require that we go beneath the surface of the rule.

¹⁰⁸ See *supra* text accompanying notes 46-47.

¹⁰⁹ See *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981); *Judicial Review versus Democracy*, 42 OHIO ST. L.J. 1 (1981); *Judicial Review and the Constitution The Text and Beyond*, 8 U. DAYTON L. REV. 443 (1983).

¹¹⁰ I use "dictionary definition" to make the statement non-trivial. Everyone purports to be defining the terms in the Constitution. The dispute is about where the definition comes from. See Schauer, *supra* note 28.

¹¹¹ See Schauer, *supra* note 46. See also *supra* note 64 and accompanying text.

¹¹² For more extensive criticism of this approach, see Monaghan, *supra* note 47.

written down in the authoritative document, and then proceed to work out a theory of freedom of speech. Under this approach we accept the presupposition that speech is special, because the text imposes that presupposition on us. Then we try as hard as we can to derive an underlying theory that is consistent with the textual presupposition. It is this process that I have implicitly described throughout this Article. We are required to accept the view that the Constitution gives speech and press special protection, that in close cases we must develop an underlying theory of the first amendment, and that this underlying theory must be consistent with, and preferably supportive of, the special protection for speech given by the document. It is in this sense that I maintain that speech must be special.

X

There is an intellectual ache in all of this, and it may be shared by many people now engaged in the process of trying to explore the theoretical foundations of the principle of freedom of speech. As we reject many of the classical platitudes about freedom of speech and engage in somewhat more rigorous analysis, trying to discover why speech—potentially harmful and dangerous, often offensive, and the instrument of evil as often as of good—should be treated as it is, our intuitions about the value of free speech, solid as they may be, are difficult to reconcile with this analysis. The ache, it seems to me, is caused by the fact that although the answer to “Must speech be special?” is probably “Yes,” the answer to “*Is* speech special?” is probably “No.” Reconciling this inconsistency is the agenda we cannot avoid.

HEINONLINE

Citation: 83 Nw. U. L. Rev. 547 1988-1989

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Tue May 3 10:47:26 2011

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0029-3571](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0029-3571)

LEGAL THEORY

LOW VALUE SPEECH

*Larry Alexander**

Several theories of freedom of speech divide speech into the categories of "high value," "low value," and "no value."¹ For example, Cass Sunstein has recently argued for increased governmental authority to ban pornography (as defined by him) on the ground that, in addition to being speech that produces harms that government should seek to prevent, it is "low value" speech.² The United States Supreme Court has deemed pornography (as defined by it) to be "no value" speech, thus subject to a complete ban; and it has deemed adult books and movies and commercial speech to be "low value" speech, thus subject to regulation beyond that to which "high value" speech is subject.³

Dividing the realm of speech into "high value," "low value," and "no value" is quite problematic, however, and for a reason that is very seldom addressed. Such division assumes that, for purposes of "freedom of speech" values, "speech" resides in an object, such as a printed page, a frame of film, or a series of sounds, rather than in the derivation of meaning from the object by the audience or in the intended meaning of the speaker. But that assumption is erroneous. The statement, "Subjugate women!," appearing on a political pamphlet, may convey exactly the same meaning to its audience as a pornographic picture of a woman in bondage. That is, the viewers of the pornographic picture may react to the picture by forming the idea of subjugating women, the same idea that they derive from the pamphlet. If that is the case, then there seems to be

* Professor of Law, University of San Diego. I gratefully acknowledge the excellent suggestions I have received from Carl Auerbach, Kevin Cole, Paul Horton, Richard Saphire, Fred Schauer, and Chris Wonnell.

¹ See, e.g., Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U.L. REV. 372 (1979); Franklin, *Constitutional Libel Law: The Role of Content*, 34 UCLA L. REV. 1657 (1987); Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U.L. REV. 1137 (1983); Wright, *A Rationale from J.S. Mill for the Free Speech Clause*, 1985 SUP. CT. REV. 149. See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 920-44 (2d ed. 1988).

² Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589.

³ See *Central Hudson Gas Elec. Corp. v. Public Serv. Comm. of New York*, 447 U.S. 557 (1980) (commercial speech); *Young v. American Mini Theaters*, 427 U.S. 50 (1976) (adult books and movies); *Miller v. California*, 413 U.S. 15 (1973) (pornography).

a good argument for regarding the pamphlet and the picture as having the same value as speech. If the pamphlet is "high value" speech, then so too it would appear is the pornographic picture. Conversely, if the latter is "low" or "no value" speech, then so is the pamphlet.

What are the arguments available for distinguishing these two types of speech in terms of their value?

It is important to point out that one cannot create a distinction between the pamphlet and the picture by reference to the government's reasons for banning the picture, at least if the reasons are those advanced by Sunstein and others.⁴ If the government is banning the pornographic picture because viewing such pictures leads people to form the idea of subjugating women, which idea then leads some of them to commit acts of violence and discrimination against women, the government has an equal interest in banning the pamphlet.

How else might the Court, Sunstein, and others defend their distinctions? Not by pointing out that only a few viewers of the pornographic picture will derive the loathsome message from it, whereas almost all readers of the pamphlet will derive its literal message from it. If true, that fact cuts exactly the wrong way, for it makes the government's concern with the pamphlet greater than its concern with the picture. Moreover, I doubt that the proponents of making value distinctions among types of speech would ban National Geographic, medical textbooks, or paintings of nudes even if it turned out to be the case that the most numerous viewers of those items were voyeurs.⁵

Nor would distinctions work that were based on the speaker's intent. The problem with focusing on the speaker's intent is not just that the pornographic picture may have been intended to be a political statement, and the "political" pamphlet may have been written by one who sells S & M paraphernalia. The fundamental problem is that under the most plausible theories regarding the justification of freedom of speech, the "value" of speech resides in the derivation of meaning by its audience and not in the intended meaning, *if any*, of the speaker. I shall return to this point later.⁶ It is sufficient at this juncture to point out, by way of an example drawn from commercial speech (another category of speech dubiously considered to be "low value"⁷), that the "value" of "buy a Chrysler" does not decline when its author is Lee Iacocca rather than

⁴ Sunstein supports bans on pornography because pornography can be linked to violence and discrimination against women. Sunstein, *supra* note 2, at 594-602.

⁵ See Alexander & Horton, *The Impossibility of a Free Speech Principle*, 78 Nw. U.L. REV. 1319, 1331-32 (1983).

⁶ See *infra* text accompanying notes 19-21 and note 19 *infra*.

⁷ See generally L. TRIBE, *supra* note 1, at 931-34. For attacks on the relegation of commercial speech to "low value" status, see Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982); Wolfson, *The First Amendment and the SEC*, 20 CONN. L. REV. 265 (1988).

Ralph Nader.⁸

Another basis for a distinction between picture and pamphlet that might be offered is the distinction between verbal and nonverbal media. "Low value" or "no value" speech may be meaning transmitted by and/or derived from nonverbal media.

There are three problems with this focus on verbal content. First, many may derive a meaning from the picture that they consciously verbalize, a meaning that is as fully cognitive for them as the meaning they derive from the pamphlet. Second, the noncognitive "meanings" conveyed by nonverbal media may also be conveyable by verbal media.⁹ Third, and most important, there is no question that the proponents of the distinction in question would treat many dangerous messages as "high value" speech even if communicated through nonverbal media. A Diego Rivera mural that clearly "advocates" violent revolution would undoubtedly be treated by almost everyone as "high value" political speech,¹⁰ and given the same protection as a political tract verbally advocating violent revolution (assuming no imminent danger).¹¹ But how then can the case for banning the pornographic picture be distinguished?

There is still another case that might be offered for dividing speech into "value" categories and distinguishing the pornographic picture from the pamphlet. One might argue that there is a free speech distinction between messages delivered in propositional form and messages delivered in nonpropositional form. This distinction is different from the verbal-nonverbal distinction; much verbal expression is nonpropositional. Literature is one example since, although novels and poems contain propositions, their "meaning" cannot be fully captured by only some of their propositions or by alternative propositions.

The distinction is relevant in two ways. On the one hand, nonpropositional messages may never become consciously propositional for the audience, but may instead affect behavior only subliminally. Dangerous nonpropositional messages are therefore more threatening than their equivalent propositional messages because the audience, not being di-

⁸ Though, of course, its credibility might. See Alexander, *Speech in the Local Marketplace: Implications of Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc. for Local Regulatory Power*, 14 SAN DIEGO L. REV. 357, 374 (1977); Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212, 1257-58 (1983).

⁹ Consider, for example, *Cohen v. California*, 403 U.S. 15 (1971) (expression "Fuck the Draft" is constitutionally protected because it has an emotive force and hence a "meaning" different from alternative verbal formulations of the abstract idea).

¹⁰ First amendment protection of expression through nonverbal media is well entrenched in Court doctrine. See, e.g., *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *Winters v. New York*, 333 U.S. 507 (1948). There is some dissent, however, from this position. See, e.g., E. WOLGAST, *THE GRAMMAR OF JUSTICE* 122-24 (1987); Wright, *supra* note 1, at 169-71.

¹¹ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (advocacy of violence must amount to incitement of imminent lawless action to lose its constitutional protection).

rectly aware of them, cannot reject them through rational consideration of their merits.¹² On the other hand, in terms of positive freedom of speech values, nonpropositional communications have little weight. That is, or so the argument goes, freedom of speech exists primarily to protect the full consideration of propositions. Therefore, if the government is dealing with a nonpropositional form of expression, and it believes the audience will receive a dangerous message in nonpropositional, subliminal form from the expression, it may regulate the expression without offending free speech values.

This distinction between propositional and nonpropositional expression is a distinction that may have some intuitive appeal, but is it a distinction that we wish the courts to make under the first amendment? The distinction not only places the Diego Rivera mural on the wrong side of the line, leaving it unprotected under the first amendment; the distinction also reads out of the first amendment everything that is nonpropositional: literature, art, movies, dance, and so on. For although such forms of nonpropositional expression may convey ideas that can be stated propositionally, they themselves, viewed as wholes, are nonpropositional. Mountains of Supreme Court precedents protecting such items would have to be overturned to limit the first amendment to the protection of propositions.¹³ Moreover, even propositional speech has nonpropositional emotive (and even subliminal) qualities that the government might wish to regulate.¹⁴ In the absence of such a diminished role for the first amendment, the propositional-nonpropositional distinction cannot serve as the basis for dividing up types of speech according to their value.

Even if one does not view the wholesale overturning of precedent as too high a price to pay in order to purify first amendment doctrine and relegate protection only to propositions (on the theory that the first amendment is concerned with rational debate rather than with communication of ideas *per se*), the problem of drawing the line between propositional and nonpropositional speech should give one pause. A string of propositions can convey a message that is found in none of the propositions taken singly nor in all of them construed as an argument, but that is instead located in the nonpropositional, emotive "spin" or affect that the proposition generates for its audience. Is such a string "propositional" or "nonpropositional"? I'm relatively sure that there is no principled way of answering that question. I'm even more certain that most of us don't want the courts to be in the business of deciding whether an expression is sufficiently "propositional" to warrant protection from regulation motivated by legitimate governmental concern with the expression's nonpropositional spin.

¹² See Sunstein, *supra* note 3, at 606; E. WOLGAST, *supra* note 10, at 122-24.

¹³ See *supra* note 10.

¹⁴ See, e.g., *Cohen v. California*, 403 U.S. 15 (1971).

Moreover, the attempt to distinguish speech of different value leads to intractable difficulties of classification. The attempt to distinguish commercial from other speech has already spawned several examples of these difficulties in the case law.¹⁵ But pornography is just as rife with examples. What if our pornographer puts a typed political statement underneath the picture? What if the political pamphleteer puts an otherwise pornographic picture on his pamphlet? Why look at *Ulysses* as a whole rather than at particular "pornographic" words or sentences? And what if a pornographic work is of great value in a social science class or research project? Is it still "low" or "no value" speech? Or is the "whole" work the item plus the class or research project that incorporates it? The point here is not the usual one about the difficulty of drawing lines among categories that are hard to distinguish at their margins but easy to distinguish at their cores. The point is rather that "pornography" cannot be distinguished from "other speech" except in terms of the ideas it conveys or the uses to which it is put.

None of these puzzles can be solved, I believe, because they are all based on an assumption that is mistaken, namely, the coherence for freedom of speech purposes of the "value" taxonomy when applied to various forms of communication.

If, taken singly, neither nonpropositional form, authors' intentions, audience interests, nor linkage to harms distinguish pornography from other, fully protected speech, then perhaps it is the combination of these characteristics that does. That is, in fact, Sunstein's position on what distinguishes "low value" from "high value" speech:

[I]n determining whether speech qualifies as low value, the cases suggest that four factors are relevant.

First, the speech must be far afield from the central concern of the first amendment, which, broadly speaking, is effective popular control of public affairs. Speech that concerns governmental processes is entitled to the highest level of protection; speech that has little or nothing to do with public affairs may be accorded less protection. Second, a distinction is drawn between cognitive and noncognitive aspects of speech. Speech that has purely noncognitive appeal will be entitled to less constitutional protection. Third, the purpose of the speaker is relevant: if the speaker is seeking to communicate a message, he will be treated more favorably than if he is not. Fourth, the various classes of low-value speech reflect judgments that in certain areas, government is unlikely to be acting for constitutionally impermissible reasons or producing constitutionally troublesome harms. In the cases of commercial speech, private libel, and fighting words, for example, government regulation is particularly likely to be based on legitimate reasons. Judicial scrutiny is therefore more deferential in these areas.¹⁶

Sunstein adverts to the problems with each of the criteria he men-

¹⁵ See L. TRIBE, *supra* note 1, at 896-98.

¹⁶ Sunstein, *supra* note 2, at 603-04.

tions.¹⁷ But he believes the enterprise of dividing the realm of speech into "high value," "low value," and "no value" speech to be necessary in order to make the kinds of distinctions—say, between a political stump speech and a bribe—any sensible system of free expression must make.¹⁸

Sunstein is correct that we must be able to distinguish among bans on various types of speech. In my opinion, however, the "high value," "low value," "no value" taxonomy is completely wrongheaded, if not incoherent. I have already stated why I do not think that speaker's intent, typical audience reaction, or nonpropositional form can individually demarcate a special category of "low value" speech, at least without overturning a good deal of established precedent.¹⁹ I will add now that I

¹⁷ *Id.* at 604-05.

¹⁸ *Id.* at 605.

¹⁹ Sunstein's difficulties with these factors are instructive. For example, when discussing the distinction between cognitive and noncognitive "speech," which he concedes is a difficult distinction to draw, Sunstein says that speech that is not intended to communicate a substantive message, or that is directed solely to noncognitive capacities, may be wholly or largely without the properties that give speech its special status. *Id.* at 606. Subliminal advertising and hypnosis, for example, are entitled to less than full first amendment protection. Listeners or observers will frequently draw messages from speech or conduct whether or not it has communicative intent. The fact that a message may be drawn does not mean that the speech in question has the usual constitutional value. For this, Sunstein cites *U.S. v. O'Brien*, 391 U.S. 367 (1968), the case in which the Supreme Court upheld the prosecution of draft card burners who intended to communicate opposition to the draft through the forbidden conduct.

But *O'Brien* didn't hold that the speech—the communicative aspect of what was going on in burning draft cards—had low value. Quite the contrary. The communicative aspect of the speech had quite high value, and everyone recognized that fact. Rather, it was the fact that the noncommunicative aspect of the medium of expression, namely, the loss of the draft card, was harmful independently of its communicative aspect, not the fact that the speech was "low value" as speech, that legitimated the government's prosecution of *O'Brien*.

Sunstein goes on to repeat Fred Schauer's equation of hard core pornography and sexual paraphernalia. Sunstein, *supra* note 2, at 606-07. See F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 181-84 (1982). Sunstein recognizes that part of the feminist case for regulation of pornography rests upon the fact that pornography represents an ideology, one that feminists find abhorrent. To the suggestion that speech that amounts to an ideology should not be considered "low value" because such speech lies at the heart of politics, Sunstein replies that whether particular speech is low value does not turn on whether the materials contain an implicit ideology. If it did, almost all speech would be immunized. The question instead turns more generally on the speaker's purpose rather than how the speaker communicates the message. Sunstein, *supra* note 2, at 607-08. The pornographer's purpose to produce sexual arousal in disseminating pornographic materials can be determined by the nature of the material, and any implicit ideology is communicated indirectly and noncognitively. A distinction along these lines, says Sunstein, is an integral part of the Supreme Court's commercial speech doctrine. Paid speech addressed to social issues receives full first amendment protection; paid speech proposing specific commercial transactions receives less protection, despite any implicit political statement such speech may contain. A contention that the purpose of the speech is to transmit an ideological message is easily overborne by the nature of the speech itself. Furthermore, says Sunstein, the purpose of the speaker is central to the question. Someone who burns a draft card for the purpose of protesting a war is in a very different position from someone who burns a draft card as part of a general program of arson, even if the action of the latter is taken to have expressed an ideology to bystanders.

Again Sunstein is resting his case on thin reeds. In the first place, his example of draft card

do not believe the combination of these features succeeds in identifying such a category. Imagine, for example, that a certain rock formation conveyed a politically revolutionary "message" to a small number of its viewers, though it conveyed no message at all to most viewers. And suppose, out of fear of this revolutionary "message," the government banned visiting the rock formation. I would maintain that freedom of speech is indeed implicated by government's action, and that it is the "high value" category of freedom of speech at that.²⁰ The same would be true if the government sought to ban the public's viewing of the devastation caused by an accident at a nuclear power plant out of fear that the public would form the idea that nuclear power plants should not be built; if the government sought to ban the works of Hemingway because it believed them to contain subversive ideas, and it turns out that those works were the product of the proverbial thousand monkeys on typewriters; or if the government sought to ban communications from those, such as foreigners and corporations, whose own first amendment rights are in doubt.²¹ In short, freedom of speech is at issue when, whatever action government is taking, its *reason* for taking the action is to prevent people from obtaining certain information or forming certain ideas.²² For that reason, banning pornography for fear that some people will, upon viewing it, form the erroneous idea that women should be subjugated or abused, is a core freedom of speech concern.

I need finally to deal with the fourth element that Sunstein argues

burners is inapposite because the prosecution of the arsonist is not a prosecution based on the low value of his ideology, but on the medium of his expression. Moreover, he is not treated any differently from a person who burns a draft card to protest a war. Both are prosecutable. In the second place, trying to tell whether a piece of explicit sexual art is pornography based upon the intent of the speaker—that is, whether the artist intended to communicate a message or intended merely to create sexual arousal—is very difficult and problematic. One cannot, by definition, look at the art and make the distinction on that basis, since the same picture might be drawn with different intentions. Moreover, Sunstein advances no case for why the artist's intention should matter, especially when the government's concern in regulating the art is based on its fear of the message that the audience, or part of it, will receive, regardless of the artist's intent.

²⁰ Note that this example has three of the four elements that Sunstein uses to distinguish government regulation of pornography from unconstitutional restrictions on speech—lack of intent to communicate ideas, no meaning conveyed to the majority of the audience, nonpropositional form of the medium that is meaningful for the minority of the audience. The fourth element—suspect government purpose—is dealt with in the next paragraph.

²¹ See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (corporate speaker); *Kleinendienst v. Mandel*, 408 U.S. 753 (1972) (foreign speaker); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (same).

²² See F. SCHAUER, *supra* note 19, at 98-111, 159; Alexander & Horton, *supra* note 5, at 1330-34. I take no position here on whether freedom of speech is even implicated in situations where the governmental action at issue is not taken for the purpose of preventing receipt of a message. Orthodox doctrine does support some freedom of speech concern with content neutral regulation, but I am skeptical that any principled approach can be developed in this area. See Alexander & Horton, *supra* note 5, at 1348, 1349, 1352, 1354. The messiness of what doctrine there is supports my skepticism.

distinguishes "low value" speech from "high value" speech, namely, that government regulation of "low value" speech, in contrast with its regulation of "high value" speech, is most likely based on legitimate concerns. Frankly, I find this part of Sunstein's case the most baffling. It is true that protecting women from sex discrimination and sexual violence is a quite legitimate governmental concern, as are the concerns to protect against street violence (from fighting words), commercial deception (from commercial speech), and damage to reputation (from libel). But the governmental concerns behind unconstitutional regulation of "high value" speech have often been legitimate as well. In the paradigm case of unconstitutional suppression of "high value" speech, *Brandenburg v. Ohio*,²³ the government's concern, prevention of violence, was quite legitimate and weighty *qua* concern. The problem was the weak linkage between the speech and the feared harm, not judicial suspicion that the government's reasons were not in fact prevention of violence. Moreover, the very type of linkage that government relied on in *Brandenburg* is the type that Sunstein himself relies on to support anti-pornography laws. Indeed, the purely censorial motive of disapproval of the message rather than fear of imminent harm is *more* likely to lie behind anti-pornography statutes than behind statutes banning advocacy of violence.

My critique to this point has been entirely negative, a pure case of "trashing" an orthodox doctrinal distinction. I would like to conclude this comment on a somewhat more positive note. Whenever government seeks to prevent a harm by regulating the message that is being received—what others have called the communicative impact of speech—then we can respond in terms of freedom of speech in one of three ways. First, we can treat the realm of messages as an undifferentiated whole and distinguish protected from unprotected speech on the basis of the nature of the harm that is feared and the linkage between the message and the harm. Second, we can divide that realm of messages into "high value," "low value," or "no value" *ideas* irrespective of the media through which they are conveyed. Or third, we can divide *audiences*, perhaps into the trustworthy intelligentsia, the less trustworthy unwashed, and the completely untrustworthy. I am sympathetic to the first approach. It appears, however, that under the guise of the value distinctions among types of speech, the Court and commentators are really following either the second or the third of these approaches, or more likely some mixture of the second and third approaches. If so, then the full implications of these approaches must be faced, and the justifications for them tendered. The idea of "low value" speech is an unavailing dodge.

²³ 395 U.S. 444 (1969).

HEINONLINE

Citation: 83 Nw. U. L. Rev. 555 1988-1989

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Tue May 3 10:51:58 2011

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0029-3571](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0029-3571)

COMMENTARIES

LOW VALUE SPEECH REVISITED

*Cass R. Sunstein**

The first amendment protects speech. But what activities qualify as “speech”? The distinction between speech and conduct usefully orients the inquiry, but it is incomplete. Some “conduct” has all or almost all of the characteristics that qualify speech for special protection; consider picketing, marching, perhaps draftcard-burning. Some “speech” has few such characteristics. Consider conspiracies to fix prices, consumer fraud, a letter discharging someone from employment on racial grounds, or a threatening telephone call. A large task for first amendment doctrine is to develop criteria for deciding what is constitutionally protected “speech”—criteria that enable judges and others to decide what activities are protected by the guarantee of freedom of speech.

Such criteria might well help judges to distinguish between “high-value” and “low-value” expression as well. Instead of entirely excluding some categories of expression from the universe of speech, judges might conclude that some expression may be regulated on the basis of a less stringent demonstration of harm than is ordinarily required. An approach of this sort would have the advantage of forcing government to justify the imposition of restraints on speech that lies somewhat afield from the core concerns of the first amendment—or so, at least, I shall be arguing.

I.

In order to undertake the task of distinguishing between speech and nonspeech, or between high- and low-value speech, several things should be relatively clear.

(1) An approach that distinguishes between constitutionally protected speech and other activities should not be taken to devalue those other activities, or even to suggest that they are less important than speech. Food, work, love, and friendship are all important; but eating,

* Karl N. Llewellyn Professor of Jurisprudence, Law School and Department of Political Science, University of Chicago. I am grateful to Mary Becker, Geoffrey R. Stone, and David Strauss for valuable comments on an early draft.

working, falling in love, and making friends do not usually count as speech.¹ In order to interpret the first amendment, it is necessary to decide what activities possess the characteristics of "speech" that call for special constitutional protection. That fact does not mean that activities without such characteristics are less valuable or less worthwhile.

A central point here is that the Constitution singles out speech for special protection, and in deciding what counts as speech, those entrusted with the task of interpretation must bring to bear the best available theory to account for that constitutional commitment as well as for the decided cases.² The decision to accord particular protection to "speech" may be controversial as a matter of first principles; that decision will, for some, seem an anachronistic holdover from Enlightenment rationalism, or rooted in naive understanding about the nature of communicative processes. But for those charged with interpreting the Constitution, an effort to challenge the decision to single out speech for special protection, or to adopt theories that fail to distinguish speech from other activities, would be irresponsible.

(2) The derivation of meaning is a shared process in which both reader and text play important and interrelated roles. But for constitutional purposes, a test for "speech" that depends solely or primarily on the derivation of meaning by some or many members of the audience,³ rather than on the nature and properties of the materials at issue, will be unsuccessful. A trip to Europe, a sale of commodities, a sip of coffee, a visit to a brothel, a purchase of beachfront property—none of these is plausibly "speech," at least in the absence of unusual circumstances; but those who watch or participate will derive some sort of meaning from all of these activities. To be sure, government might interfere with such activities for reasons that raise serious constitutional concerns;⁴ but to acknowledge that point is not to endorse the far more doubtful proposition that activities become speech, or high-value speech, by virtue of the fact that observers derive meaning from them. Such a test would disable courts from sensibly distinguishing between those activities that are and those that are not protected by the first amendment.⁵

(3) If distinctions are to be drawn between categories of speech in terms of their centrality to the purposes of the free speech guarantee, it need not follow that government will be permitted to ban all "low-value" speech. One might, for example, conclude that some forms of expression

¹ Of course government efforts to regulate the "speech" that might be involved in these activities would raise first amendment questions.

² It is important to recognize that the effort to develop the best theory is not untethered; it must of course take account of the constitutional tradition and of the relevant cases.

³ See Alexander, *Low Value Speech*, 83 NW. U.L. REV. 547 (1989).

⁴ *Id.* at 553 (discussion of rock formation banned because government considers its "message" to be dangerous).

⁵ See STONE, SEIDMAN, SUNSTEIN & TUSHNET, CONSTITUTIONAL LAW 1201-02 (1986).

may be regulated only on the basis of an exceptionally powerful showing of harm; that others may not be regulated unless the government is able to meet a less severe but still significant burden; and that still others are not speech at all and may be regulated so long as the regulation is "rational." Indeed, an approach of this sort is followed in current law. To say that some speech is low-value—for example, libel of private persons—is emphatically not to say that it is automatically subject to government regulation.

(4) It is impossible to develop a system of free expression without making distinctions between low and high value speech, however difficult and unpleasant that task may be. Consider the alternatives.

(a) To distinguish between high- and low-value "ideas"⁶—quite apart from harms—would be inconsistent with the generally salutary constitutional commitment to the prohibition of regulation of speech on the basis of its viewpoint.⁷ At least as a general rule, government ought not to be in the business of saying which ideas should be heard and evaluated by the citizenry.⁸ Of course some things that qualify or might qualify as "ideas" should be regulable; both child pornography and private libel might well contain "ideas." But it is far more sensible to look at the issues of harm and value, rather than to authorize government to distinguish among ideas on their merits.

(b) It would not be plausible to base first amendment doctrine on distinctions among the audiences for speech, or to treat some categories of citizens as more trustworthy than others.⁹ There are no readily available criteria for making such distinctions; and any effort at distinguishing among audiences would be easy to abuse. Class or racial biases are especially likely dangers in a judicial assessment of which audiences could hear what kinds of speech; and even if biases of this sort could be avoided, others would undoubtedly intrude. Outside of unusual settings, all audiences should be treated the same.

(c) The most plausible alternative to an inquiry into value would be to look at the question of harm alone.¹⁰ On this view, the question is whether the speech causes sufficient harm to permit regulation, and it does not matter what "value" the speech has. An approach of this sort would have the advantage of simplicity. It would also avoid the signifi-

⁶ See Alexander, *supra* note 3.

⁷ See Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983). On some of the difficulties with the requirement of content neutrality in the context of pornography, see C. MACKINNON, *FEMINISM UNMODIFIED* (1987); Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589.

⁸ In some cases, of course, the risk of a hostile audience reaction is relevant to the constitutional question.

⁹ See Alexander, *supra* note 3 at 548.

¹⁰ Alexander favors this approach, *supra* note 3 at 554. See also Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 51 (1982).

cant difficulties, and the risks of abuse, involved in assessing the value of different kinds of expression.

Such an approach would, however, impose intolerable pressures on constitutional doctrine. Consider the enormously wide range of the category of "speech," covering, for example, libel of public and private actors, pornography, political speech, commercial speech, conspiracies, bribes, threats, contractual agreements, public debates. If the question of value is put to one side, there are only two possibilities for doctrinal development, and both of them are unacceptable. The first would be to impose a relatively weak burden of justification on government, in order to allow it to regulate such harmful activities as misleading or false commercial speech, child pornography, and libel of private citizens. By hypothesis, a system looking at harm alone would have to extend that weaker burden across the board, and thus to all categories of speech. This route would, however, be singularly difficult to defend, since it would allow for public regulation of a wide range of speech—including misleading or false political speech, or libel of public officials—that, by general agreement, ought not to be subject to government control. In short, the less stringent burden properly placed on governmental efforts to regulate some forms of speech should not be extended to (for example) political debates.

The second possibility would be to adopt for all speech a quite stringent justification requirement, one that would forbid regulation that is currently accepted, on the theory that the quite severe burden applied to political speech should be extended to (for example) commercial speech. Such a system would be equally vulnerable, for it would fail to draw lines that ought to be drawn. It is difficult to maintain that false commercial speech, libel of private figures, conspiracies, or child pornography ought to be immunized from governmental control—as in all likelihood they would be if the stringent burden properly imposed on governmental efforts to regulate political speech were extended to all categories of expression. In these circumstances, the most likely outcome of a doctrinal refusal to look at the "value" side would be that judgments about value would be made tacitly, and the articulated rationale for decisions would not reflect an assessment of all factors thought relevant by the courts.

These conditions suggest that it would be exceptionally difficult to develop free speech doctrine without distinguishing between categories of speech in terms of their centrality to the first amendment guarantee. The most powerful argument in favor of distinguishing between high- and low-value speech is that the alternatives turn out, on reflection, to be intolerable.

To say this is not to deny that there are serious dangers in denominating some speech as low-value. Judges may err; impermissible factors may enter into the determination; there are risks of abuse; as we will see, it is hard to develop good criteria for making the relevant distinctions.

But if it is even plausible to make distinctions between high- and low-value speech, such an approach appears preferable to the alternatives.

II.

The fact that distinctions between different categories of expression—in terms of their centrality to the purposes of the first amendment—are unavoidable need not be a reason for alarm; some of the polar cases are quite easy. Speech that is intended to contribute to governmental affairs, broadly defined, unquestionably belongs in the category of high-value speech; speech that consists of unintelligible syllables does not. Intuitions of this sort are probably sufficient to resolve a broad range of cases, and perhaps to provide a workable basis for approaching the bulk of first amendment problems.

Unfortunately, however, there will be hard cases as well, and it is difficult to develop a simple test for distinguishing between high- and low-value speech that accounts either for judicial decisions or for widely held understandings and intuitions. In these circumstances, one might base the inquiry on the decided cases, which seem to point to a somewhat unruly set of considerations. These include (1) the relevance of the speech to a principal purpose of the first amendment, the effective democratic control of public affairs; (2) the cognitive or noncognitive character of the speech, which goes to one of the central goals of free expression, which is to permit the free communication of ideas; (3) the purpose of the speaker—an idea with roots in the writing of Mill¹¹—which may or may not be to communicate a message; and (4) the possibility that the speech belongs in a category in which government is unlikely to be acting for constitutionally impermissible reasons or to be producing constitutionally troublesome harms.

Ideas of this sort account for a wide range of fully plausible results. If the first amendment is designed above all to promote democratic control of government, commercial speech, for example, is far afield from its central purpose. Advertisers are not attempting to communicate a political message,¹² and government is likely to be regulating commercial speech for legitimate reasons.¹³ Similar ideas account for the characterization, as low value speech, of bribery, private libel, and obscenity. At least in general, all of these fall in the low-value category by reference to the four criteria. Application of factors of this sort is inevitably unruly, and makes the decision uncomfortably ad hoc; but perhaps this is the

¹¹ See Wright, *A Rationale from J.S. Mill for the Free Speech Clause*, 1985 SUP. CT. REV. 149.

¹² In some cases, of course, they might be; and some kind of political message may be implicit in advertisements. In the first case, constitutional protection should attach at the highest level; in the second case, the fact of an implicit message is an insufficient reason to accord such protection. See Sunstein, *supra* note 7, at 607-08.

¹³ It is possible, however, that restrictions on commercial speech will be sought by well-organized private groups seeking to cartelize the industry.

best that a system of free expression can do in light of the overwhelming likelihood that a less complex inquiry will produce significant errors.¹⁴

If it is necessary to develop a more concise and unitary test—one that is sensitive to the historic functions of the first amendment—perhaps speech should qualify as high-value if it expresses a point of view on a question of public importance.¹⁵ Under this approach, expression—whether speech or conduct—that sets out an intelligible position on a public subject is protected. On this view, *Cohen v. California*,¹⁶ for example, was rightly decided. Political speeches, whatever their content—draftcard burning; racist or misogynist tracts—all these qualify for protection, unless there is an exceedingly powerful demonstration of harm. But ordinary conspiracies, contracts, bribes, threats, publication of the names of rape victims, commercial speech¹⁷—and pornography¹⁸—can usually be regulated on the basis of a lesser showing of harm. Of course there will be hard intermediate cases, and some situations will pose unusual difficulty. But it is inevitable for, and thus no embarrassment to, a sensible system of free expression that it is unable to avoid that problem.

III.

In general, government may not regulate speech because it disap-

¹⁴ See Farber & Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987); Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U.L. REV. 1212 (1983).

¹⁵ This test works well as a sufficient condition for protection; it is less satisfying as a necessary condition.

It would follow from this approach that music and art are, at least as a general rule, more likely to be regulable than political speech. In the genuinely troublesome cases, however, government will in all likelihood be attempting to control those forms of expression for impermissible reasons, in which case the constitutional proscription will be triggered.

¹⁶ 403 U.S. 15 (1971). It is irrelevant here that the word "Fuck" was used during the political message; the method of communicating was one of the central features of the message. One cannot prohibit the use of expletives while holding the "message" constant.

¹⁷ I collapse some quite complex issues here. Government efforts to regulate all of these forms of speech might in some settings raise serious constitutional questions. For purposes of this brief essay, I am speaking of general regulation of all these forms of speech, regulation that is widely accepted.

¹⁸ The principal point here is that most pornography does not express a point of view on an issue of public importance, any more than does a prostitute or a rape or a sexual aid. In this respect, pornography is critically different from a misogynist tract, which consists of a direct appeal on an issue of public importance, one that engages cognitive capacities. With respect to both value and harm, the fact that pornography is essentially a sexual aid substantially strengthens the case for regulation. See Sunstein, *supra* note 7, at 606.

It is not an argument in favor of the constitutional protection of pornography that pornographers tend to be misogynists and that pornography tends to inculcate misogyny; the act of pimping, or of engaging a prostitute, may involve the same characteristics as pornography, but it is not by virtue of that fact qualified to the highest protection accorded to political speech. Of course regulation of some forms of sexuality may raise serious constitutional questions under the due process and equal protection clauses. See, e.g., Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988). But it is doubtful that the control of pornography, as defined in Sunstein, *supra*, would do so.

proves of a point of view;¹⁹ and a severe burden of justification is properly imposed on government whenever it attempts to regulate speech that bears on political affairs, broadly understood. But the constitutional commitment to free expression, and to the protection of dissent, cannot plausibly be taken to disable the government from controlling all activities that might qualify as speech. If taken to an extreme, the generally salutary antipathy to "censorship" would protect those who defraud consumers; who conspire, threaten, and bribe; who disclose to unfriendly countries plans to develop military technology; who use children to produce pornography; who disclose the names of rape victims; and who spread knowing falsehoods about private citizens. And if judges are unwilling to distinguish between high- and low-value speech, government will be unable to control these forms of expression without simultaneously lowering the burden of justification and thus endangering other speech that belongs at the center of constitutional concern. To draw such distinctions is not a simple task; but it is a task that a well-functioning system of free expression cannot refuse to undertake.

¹⁹ For the basic defense, see Stone, *supra* note 7. See also Sunstein, *supra* note 7, on some of the complexities here.

HEINONLINE

Citation: 92 Colum. L. Rev. 1321 1992

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Mon May 2 15:52:05 2011

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0010-1958](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0010-1958)

UNCOUPLING FREE SPEECH

*Frederick Schauer**

Sticks and stones may break your bones, but names will never hurt you. Or so our parents admonished when we were seven years old. By the time we reached nine or ten, however, we realized that our parents were wrong, and that a host of communicative acts could indeed hurt us, the hardly surprising consequence of the essentially social nature of human communication.

The capacity of speech to cause injury in diverse ways contends with the goal of strong free speech (and free press) protection, and it is a commonplace that robust free speech systems protect speech not because it is harmless, but despite the harm it may cause. Given that existing First Amendment doctrine protects those who negligently and erroneously charge public officials and public figures with criminal behavior,¹ immunizes from tort liability publications causing bodily injury or death,² and shields from prosecution those who successfully abet violent criminal acts,³ it can scarcely be denied that a major consequence

* Frank Stanton Professor of the First Amendment and Professorial Fellow of the Joan Shorenstein Barone Center on the Press, Politics and Public Policy, John F. Kennedy School of Government, Harvard University. Earlier versions of this Article were presented as part of the Philip Hart Memorial Lectureship at the Georgetown University Law Center, and at the University of Michigan Law School, the City Club of San Diego, and the Constitutional Law Resource Center of Drake University. I have also benefitted greatly from the comments of Ronald Cass, Richard Fallon, Heidi Feldman, Lauren Fishbein, Richard Friedman, Louis Kaplow, Marta Morgan, Morton Halperin, Daniel Polsby, Mike Scherer, Timothy Brennan, Mark Tushnet, Virginia Wise, and Richard Zeckhauser.

1. See *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 296 (1971) (plainly erroneous report of indictment for perjury); see also *Rood v. Finney*, 418 So. 2d 1, 2 (La. Ct. App. 1982) (plainly erroneous report of drug addiction), cert. denied, 420 So. 2d 979 (La. 1982), and cert. denied, 460 U.S. 1013 (1983).

2. See *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802, 803 (S.D. Tex. 1983), motion to dismiss denied, 583 F. Supp. 1566 (S.D. Tex. 1984), rev'd, 814 F.2d 1017 (5th Cir. 1987), cert. denied, 485 U.S. 959 (1988); *Olivia N. v. National Broadcasting System Co.*, 178 Cal. Rptr. 888, 892-93 (Ct. App. 1981), cert. denied sub nom. *Niemi v. National Broadcasting Co.*, 458 U.S. 1108 (1982); *Walt Disney Prods., Inc. v. Shannon*, 276 S.E.2d 580, 582 (Ga. 1981). In all of the foregoing cases (and many others), the relationship between the publication and the injury would have satisfied standard tort requirements of negligence, foreseeability, and proximate cause. See generally Frederick Schauer, *Mrs. Palsgraf and the First Amendment*, 47 Wash. & Lee L. Rev. 161 (1990). In some contrast to the above cases, however, is *Berhanu v. Metzger*, No. 8911-07007 (Cir. Ct., Multnomah County, Or., Oct. 22, 1990) (appeal pending). There, the victim of an attack by members of the White Aryan Resistance sued the leader of that organization for encouraging the attack, and the jury, finding specific intent, foreseeability, and proximate cause (although not imminence), found for the plaintiff against the leader in the amount of \$12,479,000.

3. See *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 333-34 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986). See Kent

of a highly protective approach to freedom of speech and freedom of the press is to shelter from legal reach a set of behaviors that could otherwise be punished and a set of harms that could otherwise be compensated.

Implicit in conventional First Amendment rhetoric is that it could not be otherwise. To put it more precisely, existing understandings of the First Amendment presuppose that legal toleration of speech-related harm is the currency with which we as a society pay for First Amendment protection. Paying a higher price by legally tolerating more harm is thus taken to be necessary in order to get more First Amendment protection.⁴ Conversely, it appears equally well accepted that being more concerned about speech-related harm by tolerating less of it requires accepting a commensurately weaker First Amendment.⁵ And although people disagree about the amount of free speech protection they wish to have and, consequently, the extent of harm they wish to have their legal system tolerate, they agree about the necessary connection between speeches protected and harms tolerated. Such disagreements as exist are only about the appropriate ratio and not about the structure of the relationship.

I propose to call into question this very relationship, suggesting that the coupling of harm-toleration and speech-protection is by no means inevitable. In questioning the relationship, I do not suggest we can get something for nothing. Still, I will argue that existing understandings of the First Amendment are based on the assumption that, because a price must be paid for free speech, it must be the victims of harmful speech who are to pay it. This assumption, however, seems curious. It ought to be troubling whenever the cost of a general societal benefit must be borne exclusively or disproportionately by a small subset of the beneficiaries. And when in some situations those who bear the cost are those who are least able to afford it, there is even greater cause for concern. If free speech benefits us all, then ideally we all ought to pay for it, not only those who are the victims of harmful speech. Moreover, although much of modern law reform, especially in

Greenawalt, *Speech, Crime, and the Uses of Language* 262–63 (1989); Kent Greenawalt, *Speech and Crime*, 1980 *Am. B. Found. Res. J.* 645, 650–53.

4. See generally Lee C. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (1986) (arguing that protecting harmful extremist speech is necessary if central free speech values are to be served); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 *Wm. & Mary L. Rev.* 267, 270 (1991) (assuming inherent conflict between preservation of free speech and restraint of racist expression).

5. See, e.g., Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 *Nw. U. L. Rev.* 343, 383–86 (1991) (urging reversal of assumption that equality values must give way to free speech values); David A. Logan, *Tort Law and the Central Meaning of the First Amendment*, 51 *U. Pitt. L. Rev.* 493, 554–55 (1990) (advocating limiting scope of First Amendment protection in order to provide greater redress for victims of speech-related harm).

torts, has reflected attempts to reallocate costs towards those best able to bear them and to adjust incentives in order to achieve optimal patterns of behavior, this trend has as yet failed to influence our understanding of constitutional rights in general and free speech rights in particular.

Responding to these concerns, I try here to situate First Amendment analysis within a framework that examines critically the question of who pays for our rights and whether a shifting of those costs is desirable or feasible. I will examine the possibility of reassigning the costs of a free speech system, and will explore methods of reassignment that might achieve without mirrors the dual goals of retaining a free speech system of great strength and lessening the disproportionate burdens of that system on those who have historically paid for it.

I will devote considerable attention to defamation. Because the ability to attack the qualifications and performance of public policymakers goes to the core of the modern American conception of democracy, preserving the gains of *New York Times Co. v. Sullivan*⁶ is taken as virtually axiomatic even by those whose views on other First Amendment topics are less speech-protective.⁷ Yet the harms ensuing from factually erroneous statements about identified individuals are hard to deny. Moreover, the harms of defamatory statements have traditionally been measured in and compensated with money, so contemplating the costs of a free speech system in dollar terms fits well within defamation's adjudicatory tradition. Compared to many other areas, therefore, defamation may be one area in which there is less disagreement both about the importance of unchilled speech and about the harms that it may inflict. With relatively little controversy about the values involved, it becomes easier to focus on the interrelationship between those values, and I will explore various ways in which quite different forms of cost-shifting might make it possible to keep the virtues of *New York Times* while removing some of the costs of these virtues from the shoulders of those whose harms are so apparent.

I will focus as well on otherwise-compensable physical harms proximately caused by acts of communication. As cases like *Herceg v. Hustler*

6. 376 U.S. 254 (1964).

7. E.g., myself. Compare, e.g., Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399, 399 n.1 (1985) (approving *New York Times v. Sullivan*) with Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 Geo. L.J. 899, 932 (1979) (approving classification of obscenity as regulable nonspeech). Another example would be Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum. L. Rev. 449, 476–80 (1985) (arguing that First Amendment that protects only core values is better able to defend them in repressive times).

*Magazine*⁸ and *Olivia N. v. National Broadcasting Co.*⁹ indicate, injuries that would otherwise be compensated in the tort system frequently go uncompensated because immunizing publisher-defendants from liability is believed necessary in order to prevent a degree of self-censorship antithetical to the goals of the First Amendment. Here the issue is not quite as crisp, because the ranks of those who think it necessary to protect *Hustler's* right to publish instructions for auto-erotic asphyxiation in order to satisfy the demands of the First Amendment are thinner than the ranks of those who think it necessary to protect newspaper criticism of official behavior in order to satisfy the same goals. Still, as the result in *Herceg* indicates, many people do maintain that immunizing the kind of communications at issue in that and similar cases is necessary for the requisite level of First Amendment protection. As long as that view holds sway, there is reason to search for ways of satisfying it without having the costs borne as heavily as they now are by those who are the victims of the protected speech. Accordingly, the search for ways of reallocating the costs of free speech protection away from the class of victims and more towards society as a whole holds out the promise of a more equitable approach to paying for a general social benefit.

My aim is not to present concrete proposals for law reform. Some of what I suggest does not involve law reform at all, and even where I suggest the broad outlines of law reform possibilities, those suggestions remain subordinate to the broader goal of shifting the very way we think about topics like defamation and speech that produces physical injury. Only after that shift has taken place can we explore in more detail than I pursue here the concrete proposals that might follow from what I suggest abstractly.¹⁰

8. 565 F. Supp. 802 (S.D. Tex. 1983), motion to dismiss denied, 583 F. Supp. 15, 66 (S.D. Tex. 1984), rev'd, 814 F.2d 1017 (5th Cir. 1987), cert. denied, 485 U.S. 959 (1988). In *Herceg*, which I discuss in more detail infra notes 66-81 and accompanying text, the First Amendment was held to preclude recovery in a wrongful death action based on a fourteen-year-old boy's imitation of a *Hustler* magazine article detailing the practice of auto-erotic asphyxiation.

9. 178 Cal. Rptr. 888 (Ct. App. 1981), cert. denied sub nom. *Niemi v. National Broadcasting Co.*, 458 U.S. 1108 (1982). In *Olivia N.*, the First Amendment also barred recovery in a case in which a group of teenagers, copying an act depicted on the NBC television movie *Born Innocent*, raped a nine-year-old girl with the use of a "plumber's helper."

10. I also avoid highly specific proposals because while any such proposal will undoubtedly have flaws and pitfalls, the normal operation of the bias in favor of the status quo, see William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decisionmaking*, 1 J. Risk & Uncertainty 7, 8-10, 37-41 (1988), is to take flaws or pitfalls in a new proposal as fatal while taking flaws or pitfalls in an existing approach as relatively inconsequential. Although at times we are unduly critical of the status quo and conversely unduly optimistic about that which has yet to be tried, the status quo bias seems to be more prevalent, partly because we often see problems in an existing approach as tolerable, and we know this because we have tolerated them. Such an attitude of tolerating the flaws in the status quo, however, is often a function of having

Moreover, taking on the task of offering concrete proposals for reform would presuppose a comprehensive framework for determining not only when individuals should be compensated for their injuries—a question that our tradition answers with an equivocal “sometimes”—but also when individuals should be compensated for shouldering the burdens of general social benefits—a question that provokes an equally unilluminating “sometimes” response. So in some sense my goals are narrow, leaving these broad projects for others, and focusing on the narrower class of cases in which, but for the First Amendment, people would be compensated for the harms they suffer. Looking at the question in this way will enable us to see more clearly the costs of the First Amendment, even though a broad-based approach to those harms might entail developing a framework for dealing with a much wider variety of harms.

A final reason for keeping concrete and detailed proposals off the agenda is that defamation and physical-injury-producing communications are merely examples of a larger First Amendment theme. In numerous other often-debated areas, of which various forms of hate speech (including racist speech and speech encouraging violence against women) are among the most timely,¹¹ I believe that we can profitably start to suppose that heightened attention to the victims of speech need not entail reductions in the amount of free speech nearly as great as that heightened attention is generally thought to demand. For once we uncouple¹² the freedom of speech from the compensation

become so inured to a harm that we no longer think of it as a harm. And often the attitude of tolerating an imperfect status quo is a function of the fact that it is Someone Else who is doing the tolerating. This especially is much of the theme of this entire Article, so I will say no more about it here.

11. Because *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), has made at least some means of combatting what is commonly called “hate speech” less available than might otherwise have been thought to be the case, the need to consider less speech-restrictive forms of recognizing the injuries seems even more pressing.

12. The idea of “uncoupling” or “decoupling” already has some currency to describe proposals for law reform (usually with a focus on torts) that would separate the deterrence and compensation functions, or that would eliminate the coupling between what the defendant pays and the plaintiff receives. See Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* 218 (1988); Stephen R. Perry, Comment on Coleman: Corrective Justice, 67 Ind. L.J. 381, 384–87 (1992); A. Mitchell Polinsky & Yeon-Koo Che, Decoupling Liability: Optimal Incentives for Care and Litigation, 22 Rand J. Econ. 562, 563 (1991); A. Mitchell Polinsky, Detrebling Versus Decoupling Antitrust Damages: Lessons from the Theory of Enforcement, 74 Geo. L.J. 1231, 1234–35 (1986); Steven C. Salop & Lawrence J. White, Economic Analysis of Private Antitrust Litigation, 74 Geo. L.J. 1001, 1037 (1986); Warren F. Schwartz, An Overview of the Economics of Antitrust Enforcement, 68 Geo. L.J. 1075, 1093–96 (1980); Stephen D. Sugarman, Doing Away with Tort Law, 73 Cal. L. Rev. 555, 642–44 (1985) [hereinafter Sugarman, *Doing Away with Tort Law*]; Alfred F. Conard, Coup De Grace for Personal Injury Torts, 88 Mich. L. Rev. 1557, 1567–68 (1990) (book review); Stephen D. Sugarman, Doctor No, 58 U. Chi. L. Rev. 1499, 1522–24 (1991) (book review). If uncoupling is valuable even when both compensation and deterrence are

(literally or figuratively) of the victim we will see that goals often thought mutually exclusive can be at least somewhat compatible. Thus this article is not about defamation or any other specific category of First Amendment analysis, but is a proposal for rethinking the very way in which that analysis should proceed.

I.

Let me start with a concrete example that has attracted my attention previously.¹³ In *Ocala Star-Banner Co. v. Damron*,¹⁴ the Supreme Court demonstrated with stunning clarity the costs commonly associated with *New York Times Co. v. Sullivan*.¹⁵ The facts of *Ocala Star-Banner* are straightforward: Leonard Damron was the mayor of the town of Crystal River, Florida, and a candidate for County Tax Assessor of Citrus County. On April 17, 1966, a reporter telephoned the *Star-Banner* with a story that James Damron (who happened to be the brother of Leonard Damron) had been arrested and charged with perjury in the United States District Court in Gainesville, with the trial to take place in the following term of that court. The area editor, who had been working at the paper for just more than a month, wrote up the story for publication, changing the name from James Damron to Leonard Damron, quite possibly on the assumption either that the two were one and the same or that the reporter on the scene had misstated Leonard Damron's name. As it appeared in the next day's paper, under the headline "Damron Case Passed Over to Next U.S. Court Term," the story commenced with: "A case charging local garage owner Leonard Damron with perjury was passed over for the present term of Federal Court after Damron entered a not guilty plea before Federal Judge Harrold Carswell in Gainesville."

Although the *Star-Banner* printed two retractions before the election for County Tax Assessor took place, Leonard Damron lost the election, held two weeks after the article appeared. He sued the *Star-Banner* for libel, and succeeded in establishing falsity, negligence, and a relationship between the falsity and both general damage to his reputation and specific damage to his electoral prospects. Damron ultimately won a jury award of compensatory damages in the amount of \$22,000.

The \$22,000 award was upheld in the Florida courts,¹⁶ but was then overturned by a unanimous United States Supreme Court. Justice Stewart's brief opinion made clear that the case involved little more

taken to be valuable, then it is possible that uncoupling is even more valuable when, as in most free speech areas, only the former and not the latter is desired.

13. See Frederick Schauer, Public Figures, 25 Wm. & Mary L. Rev. 905, 910-12 (1984).

14. 221 So. 2d 459 (Fla. Dist. Ct. App. 1969), cause dismissed, 231 So. 2d 822 (Fla. 1970), rev'd, 401 U.S. 295 (1971).

15. 376 U.S. 254 (1964).

16. See 221 So. 2d at 461.

than a mechanical application of the rule in *New York Times*, since no plausible case for the existence of actual malice could be maintained.¹⁷ Thus, not only is *Ocala Star-Banner* an easy case under the *New York Times* rule, but it also enables us to identify with some precision the cost of the *New York Times* rule—\$22,000—since that is what Damron would have received had that rule not been in place.¹⁸ Consequently, in order to prevent the *Ocala Star-Banner* from being excessively chilled in its pursuit of truth, Leonard Damron is compelled to forego an award of \$22,000, which is (utility functions and opportunity costs aside) the economic equivalent of compelling him to pay \$22,000.

But why Leonard Damron? He is certainly not the primary beneficiary of unchilling the *Star-Banner* and every other American newspaper and magazine. On the contrary, as Justice White's concurrence makes so clear,¹⁹ Leonard Damron is the unfortunate victim of the social benefit coming from the relaxed rule of liability.²⁰ So at the outset it seems odd that he should have to shoulder the entire cost of a benefit that is society's and not his.²¹

17. Justice White added an even briefer concurrence, see 401 U.S. at 301, for the sole purpose of emphasizing that the toleration of harmful falsity was the unfortunate but necessary price that had to be paid in order to avoid the excess suppression of truth.

18. Although *Ocala Star-Banner* precedes *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (negligence is a permissible standard of liability when plaintiff is neither public official nor public figure), by several years, it is probably safe to say that Damron would have as easily prevailed under a negligence rule as he did under the common-law strict liability rule applied by the Florida courts at trial.

There is no indication from the reported opinions that Leonard Damron was out of pocket \$22,000, but even apart from the fact that reputation usually does have monetary value, see Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. Chi. L. Rev. 782, 798 (1986), the translation of nonmonetary injuries into monetary awards is a staple of the common law. Once we recognize the frequency with which the tort system awards money damages for pain and suffering, mental or emotional distress, loss of consortium, and similarly nonquantifiable injuries, we see that there is nothing special about compensating loss of reputation with dollars. Thus, the least controversial way of describing Leonard Damron as "victim" is to note that he did not receive what he would have received had the *New York Times* rule not existed, regardless of whether in some ideal sense he "should" have received that amount or not.

19. See 401 U.S. at 301.

20. For my purposes it would have been nice were Leonard Damron a highly sympathy-inducing litigant. Alas, such an assumption may not be justified. See *In Re Inquiry Concerning a Judge, Damron*, 487 So. 2d 1, 2-3 (Fla. 1986) (approving recommendation of removal on the basis of charges of, inter alia, exchanging lenient sentences for political support, and discouraging defendants from exercising constitutional rights). For those looking for a somewhat more appealing libel plaintiff, see generally *Faulk v. Aware, Inc.*, 231 N.Y.S.2d 270 (Sup. Ct. 1962), rev'd, 244 N.Y.S.2d 259 (App. Div. 1963), aff'd, 200 N.E.2d 778 (N.Y. 1964) (TV and radio personality won large damage award against entities involved in blacklisting him because of alleged Communist sympathies).

21. Damron does benefit insofar as he is a member of society, but there is little doubt that his share of the cost vastly outweighs his share of the benefit. Consider the contrast with the Takings Clause of the Fifth Amendment, which is premised on the view that the costs of public goods should be distributed across the population rather than

But is there an alternative? My thesis is that there are alternatives at least worth considering, and I now want to explore a number of them, continuing to use *Ocala Star-Banner* as my working example. My goal, therefore, is to see whether there are alternatives to Leonard Damron's having to forego \$22,000 that do not encourage the self-censorship of the *Ocala Star-Banner*. Or, to put it differently, I want to explore whether the \$22,000 cost of the *New York Times* rule might be paid by someone other than Leonard Damron.

My working postulate is that any rule of liability more stringent than that of *New York Times* would produce too much self-censorship by the *Star-Banner* and other publications,²² and my whole point would be lost were I to relax that assumption. The assumption, however, is one that is premised on the importance of a certain amount of editorial freedom, the idea being that editors and reporters should be able to do their jobs without having to peer over their shoulders at the specter of liability for anything other than intentional falsehoods.²³ But if the goal is to liberate editors and reporters from the fear of liability, then

visited exclusively on a few. It is of course true that much modern regulation has been held to lie outside the purview of the Takings Clause even if its burdens are imbalanced, see, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) ("[T]he government may execute laws or programs that adversely affect recognized economic values."); *Miller v. Schoene*, 276 U.S. 272, 279 (1928) (held not unconstitutional to destroy "one class of property in order to save another which . . . is of greater value to the public"), but the persistence of the core of the Takings Clause, see, e.g., *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2893-900 (1992) (construction ban depriving plaintiff's land of all economically valuable use constitutes taking); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-32 (1987) (appropriation of public easement on private land constitutes taking), shows the durability of the general idea that it is taken to be at least presumptively troubling to target small numbers of individuals as the cost-bearers for broad social benefits.

22. I use the vague phrase "other publications" because the application of the *New York Times/Gertz* principles to nonmedia communicators remains in some doubt. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 781-84 (1985) (Brennan, J., dissenting); Melville B. Nimmer, *Nimmer on Freedom of Speech* § 2.08[C] (1984 & Supp. 1992); Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 *UCLA L. Rev.* 915, 930-35 (1978).

23. Nothing here turns on the distinction between intentional falsehood and "reckless disregard" for the truth, especially since the latter has been defined to require such a degree of actual suspicion of falsehood that the distinction between intent and reckless disregard is minimal. See *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (finding "that the defendant in fact entertained serious doubts as to the truth of his publication").

Experimental support for the proposition that more stringent defamation liability rules decrease the willingness of editors to print controversial articles on matters of public concern is found in Stephen M. Renas et al., *An Empirical Analysis of the Chilling Effect: Are Newspapers Affected by Liability Standards in Defamation Actions?*, in *The Cost of Libel: Economic and Policy Implications* 41, 45-66 (Everette Dennis & Eli Noam eds., 1989) [hereinafter *Cost of Libel*]. For nonexperimental analyses of the relationship between liability rules and speaker (or publisher) behavior, see Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 *B.U. L. Rev.* 685, 694-705 (1978). See generally Alain Sheer & Asghar Zardkoohi, *An*

one alternative to the actual state of affairs comes from recognition of the fact that the \$22,000 would be paid not by the editorial department but by the publisher of the newspaper, and it is hardly necessary that the publisher would require that the editorial department change its practices in order to minimize publisher liability. If the rule of legal liability were negligence rather than actual malice, Damron would recover his \$22,000. But if the publisher were to pay the award and at the same time make clear to the editorial staff that the publisher expected the editorial staff to operate *as if* the *New York Times* rule were in place, Damron would be compensated and the editorial staff would be no more chilled than it is now.

Plainly my original assumption—just the opposite of this possibility—is what drives existing law. *New York Times*, and indeed the entire constitutionalization of American defamation law, is based on the assumption that if the publisher is at financial risk, then this risk will filter down to the editorial department, with a consequent inhibiting effect on the content of the newspaper.²⁴ And certainly this seems a plausible assumption, not only because the law generally assumes that businesses are undifferentiated economic units, but also because the trickling (or pouring) down of trouble above resonates so easily with what we know about how institutions operate.

Yet however plausible the assumption of trickle-down chilling appears, it turns out to be at odds with one of the pervasive tenets of the press itself—the separation of the advertising and editorial functions.²⁵

Analysis of the Economic Efficiency of the Law of Defamation, 80 Nw. U. L. Rev. 364 (1985) (analysis of effect of liability rules on publisher behavior).

24. But maybe not. At least some editors maintain proudly that the threat of libel actions has no effect on their editorial judgments. See David A. Anderson, Libel and Press Self-Censorship, 53 Tex. L. Rev. 422, 434 (1975); David A. Hollander, The Economics of Libel Litigation, in *Cost of Libel*, supra note 23, at 257, 258 n.3; Barry F. Smith, The Rising Tide of Libel Litigation: Implications of the Gertz Negligence Rules, 44 Mont. L. Rev. 71, 87 (1983) (discussing views of counsel for the Washington Post). Assuming that such editor (manager) behavior is at least tolerated and perhaps encouraged by the publishers (owners), the explanation is likely to be complex. Part of the explanation may lie in publishers' being willing to pay for certain principles, part in publishers' believing that a given degree of editorial aggressiveness sells more papers, and part in publishers' valuing (for financial or nonfinancial reasons) a certain kind of newspaper reputation. But whatever the explanation, it seems plain that insofar as editors do operate without regard to potential legal liability, the premise that the *New York Times* rule is necessary is diminished *pro tanto*.

25. See, e.g., Norman E. Isaacs, Untended Gates: The Mismanaged Press 164–65 (1986) (describing advertiser pressure on editors as “the worst kind of conflict of interest”); Tom Wicker, On Press 181–82 (1978) (arguing that direct pressure from advertisers, while present, plays “a relatively small part in editorial decisions”). I describe this as a “tenet” rather than a “fact” because, as I will discuss shortly, I and others have substantial doubts as to whether the tenet is reflected in the reality of press practice. But my point here is only that one of the media's own tenets, whether adhered to or not, is seemingly at odds with the major claim that the media itself makes with respect to the effect of defamation law on press practices.

Thus, although it is frequently the case that advertisers refrain from advertising in newspapers because of some aspect of the content of the paper, it is a central credo of American "elite" journalism that an advertiser's threat to do so, or act of doing so, will have no effect on editorial content. If an article critical of Mobil Oil or Chase Manhattan, or of oil companies or banks in general, will prompt Mobil or Chase to withdraw their ads, then that, it is commonly held, is the price to be paid for the editorial independence that defines the high-quality newspaper, magazine, or news broadcast. Thus, to put a number on all of this, if publishing an article critical of Mobil Oil were to lead Mobil to withdraw advertising for which it would have paid \$22,000, then many American publishers would say that paying \$22,000 for editorial freedom was well worth the price. Mobil's act, says the conventional journalistic wisdom, would occasion no changes in the newspaper's editorial practices. The loss would be absorbed outside of the editorial function, and the editorial staff would be under no pressure to change their behavior towards Mobil or other advertisers.

The parallel is as intriguing as it is obvious. If a publisher claims to be willing to spend \$22,000 in order to save her editorial department from the chilling effect of worrying about whether editorial content will offend advertisers, why is she not willing to spend \$22,000 in order to save her editorial department from the chilling effect of worrying about whether that content will produce legal liability for unintentional falsehood?²⁶ From the publisher's perspective, the answer is obvious: assuming a publisher has selected her optimal degree of editorial independence from financial pressure, she will absorb the cost of editorial freedom from advertising pressures because if she does not, then no one else will; but there is no reason to absorb the cost of editorial freedom from defamation actions if she is able to have someone else, such as Leonard Damron, absorb those costs.²⁷ She thus secures the benefits of editorial freedom without having to spend the \$22,000 to obtain it. Accordingly, with respect to defamation, the publisher avoids costs that she bears with respect to advertising because she has successfully convinced the United States Supreme Court to get Leonard Damron to bear those costs for her.

Although publishers are thus no different from the rest of us in preferring that others pay for what we would pay for if we had to, we

26. As I discuss below, see *infra* notes 38, 62 and accompanying text, the plausibility of what I say here increases dramatically if the possibility of a very large award (as in *Sullivan* itself) is eliminated.

27. Is it possible that now the Damrons of the country are not "absorbing" anything because the greater vulnerability to noncompensable defamation after *Sullivan* and *Damron* is built into the salaries of public officials? If this is so, then the public, which pays those salaries, is already (and appropriately) paying for the First Amendment. But if, as I suspect, the proclivity to public officialdom is relatively salary-inelastic, and if, as I also suspect, salaries for public officials are quite market resistant, then the burden probably remains with the modern-day Damrons.

see now that there are two alternatives to a negligence rule with chilling side effects. One alternative is the rejection of the negligence rule, which is what the Court did in *New York Times*; the other alternative is a negligence rule the costs of which publishers absorb just as they supposedly absorb the costs of editorial independence from advertising. The choice of the former by the courts can thus be seen as contingent rather than necessary, even if a given amount of editorial freedom is desired. The choice of the *New York Times* approach is contingent because the choice is based on the unwillingness of publishers to pay for First Amendment benefits that publisher absorption would produce as easily as the actual malice rule.²⁸

But what if we depersonalize the publisher? Most publishers these days are not venerable newspaper families like the Grahams, the Sulzbergers, and the Taylors, but rather public corporations with managers having responsibilities to their stockholders. Does public corporate ownership, separating ownership from control, make it less plausible to suppose that ensuring editorial independence from financial pressures could be viewed as a necessary cost of doing business? Would stockholders have just cause for complaint if managers pursued goals of journalistic integrity at the expense of reduced profits?²⁹ Initially, there seems no reason to believe that this concern would apply any more to editorial independence from the consequences of money judgments in court than to editorial independence from advertising. If the latter survives even while public corporations rather than families

28. "As easily" is a bit hyperbolic, because even if we assume total editorial independence from advertising pressures, it is fair to assume that such independence will, at the margin, cause some publishers to fail who would otherwise have succeeded, or some publishers to exit who otherwise would have remained, or some publishers to refrain from entering who otherwise would have entered. In each case, this independence will have the effect of reducing the number of publishers and consequently the quantity of commentary on matters of public interest. Moreover, there is little indication that the ideology of advertising/editorial separation is held outside of the elite media, and so it may turn out, ironically, that the protections forged in *New York Times* are most necessary for publications least like the *New York Times*.

29. As a matter of law, an earlier judicial attitude of skepticism about the power of a corporation to divert its assets to general social purposes, see *Dodge v. Ford Motor Corp.*, 170 N.W. 668, 683-84 (1919), has generally been supplanted by statutory and judicial willingness to allow corporations to use part of their resources for public or charitable purposes. See, e.g., *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581, 586 (N.J.) (noting that modern conditions require corporations to shoulder social responsibilities), appeal dismissed, 346 U.S. 861 (1953); Model Business Corp. Act § 4(m) (1974) (stating "each corporation shall have power . . . to make donations for the public welfare"); Louis Kelso, *Corporate Benevolences or Welfare Distribution*, 15 Bus. Law. 259, 260-63 (1960) (lamenting evolution of "good citizen" corporation as "one of the final, logical steps toward collectivization"). Thus, just as corporate charitable contributions are now seen as appropriate expenses in the service of long-term corporate interests, so too could newspaper "contributions" to journalistic integrity be seen as a parallel investment for the future.

control the mass media, one ought to expect the same for the former.³⁰

Moreover, stockholder appreciation of values other than wealth maximization is not unheard of in corporate America. The Boston Celtics Limited Partnership, for example, a public company traded on the New York Stock Exchange, is a company in which the majority of shareholders own just one share!³¹ This suggests that many people own Boston Celtics stock not because of its price-to-earnings ratio, but rather because of the psychic benefits they accrue by knowing that they are part owners of a long tradition, a parquet floor, and the contracts of Reggie Lewis, Larry Bird, and Dee Brown.³² So if we suppose for the sake of argument that the First Amendment might be as important to some people as the Boston Celtics are to others, then it is not implausible to suppose as well that some shareholders of media companies might be willing to absorb some of the costs of the First Amendment just as shareholders of the Boston Celtics are willing to earn less money in exchange for some number of psychic benefits.³³

The argument for shifting the cost from Leonard Damron to the

30. It turns out that editorial independence from advertising pressure may not survive the corporatization of American journalism, and that editorial sensitivity to threats of advertiser withdrawal are much greater than the traditional ideology would admit. See C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. Pa. L. Rev. 2097, 2146-53 (1992) (describing relationship between advertiser pressures and content of publications); G. Pascal Zachary, *All the News? Many Journalists See a Growing Reluctance to Criticize Advertisers*, Wall St. J., Feb. 6, 1992, at A1 (citing Ronald Collins, Center for the Study of Commercialism, *Dictating Content: How Advertising Pressure Can Corrupt a Free Press* (Mar. 10, 1992)). This report, prepared by Professor Ronald Collins and the Center for the Study of Commercialism, is also described in N.Y. Times, Mar. 13, 1992, at D6; Bruce Horowitz, *Advertisers Influence Media More, Report Says*, L.A. Times, Mar. 12, 1992, at B6. In this last article, the editor and executive vice-president of the *Los Angeles Times* is reported to claim: "That kind of difficulty has not confronted The Times. We have a long-established tradition of editorial independence." Horowitz, *supra*. But the same article reports the managing editor of the *Arkansas Democrat* (now the *Democrat-Gazette*) as acknowledging instructions to a columnist not to criticize advertisers: "We do not hire opinion writers to trash advertisers. . . . No newspaper would do that." *Id.*

Note, however, that little in my argument turns on the empirical truth of the claims about editorial independence from advertising. As long as this remains the prevailing media ideology, whether factually true or not, it remains possible that a parallel ideology would apply to editorial independence from libel judgments. To the extent that *that* ideology did not reflect reality, then *New York Times* would be seen as the upshot of newspapers' unwillingness to live up to their own principles (which is one of the reasons for having laws in the first place).

31. As reported in Ken Franckling, "Loyal Shareholders Make Celtics Stock Accounting 'A Nightmare'," *United Press International* (BC Cycle), August 20, 1989.

32. Some shareholders may have bought shares believing that they would be entitled to ticket preferences, special events for stockholders, the right to attend shareholders meetings presided over by Red Auerbach, and glossy annual reports with photographs of the players. They are wrong on all counts, however, and this fact has been known for long enough that these unjustified expectations no longer influence investment decisions.

33. On the "amenity value" of corporate ownership, see Harold Demsetz &

publisher seems even stronger once we recognize that in both the long run and the short run media companies are in many ways the special beneficiaries of the First Amendment. This is not to say they are the only beneficiaries, or even the primary beneficiaries. By being the intermediary for a social good, however, media companies are the incidental beneficiaries of advantages not enjoyed by similarly situated enterprises not in the publication business. Because of the First Amendment, newspapers need worry much less than, say, pharmaceutical companies, about state and federal agencies that would regulate the quality of their product,³⁴ or less than automobile companies about federal regulations that would require them to add components to their products that they would not want to add,³⁵ or less than oil companies about targeted taxes based on animosity towards the industry.³⁶ Consequently, the fact that newspapers are in a business subject to special constitutional protection provides financial benefits not otherwise available,³⁷ and supposing that newspapers and magazines might absorb

Kenneth Lehn, *The Structure of Corporate Ownership: Causes and Consequences*, 93 J. Pol. Econ. 1155, 1161-62 (1985).

34. This may not be true with respect to the electronic media, see, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-401 (1969) (FCC's "fairness doctrine" did not violate First Amendment), although there is little doubt that the current nonexistence of the constitutionally permissible (according to *Red Lion*) fairness doctrine is attributable in part to First Amendment concerns articulated with some fervor by broadcasters as well as by the Commission itself. See *Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C.R. 5043, 5048-52 (1987), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989). For a description of the surrounding arguments, see Donald E. Lively, *Modern Communications Law* 390-415 (1991). The electronic media aside, however, the proposition that administrative regulation for accuracy or fairness of the content of newspapers and magazines would be unconstitutional is so obvious that there is not really a good citation. The best remains *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), generally understood to stand for, among other things, that "the Court has never accepted the proposition that political speech can be suppressed merely because it is deceptive or misleading." Jerome A. Barron et al., *Constitutional Law: Principles and Policy* 952 (3d ed. 1987). *Brown v. Hartlage*, 456 U.S. 45, 60-62 (1982), lends some support to the proposition that factual falsity not producing individual injury is not subject to sanctions. See also Nimmer, *supra* note 22, at § 3.03[B][3] (suggesting First Amendment protection for broad factual statements, even if false).

35. Compare the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (1992) (as amended) (requiring air bags), with *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974) (striking down Florida statute that would have required newspapers to publish replies they did not wish to print).

36. Compare the Crude Oil Windfall Profit Tax Act of 1980, I.R.C. §§ 4986-4988 (1981) (windfall profits tax on oil companies) (repealed 1988) with *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581-85 (1983) (interpreting *Grosjean v. American Press Co.*, 297 U.S. 233, 244-51 (1936) as holding that punitive motive invalidated tax on publications with circulation greater than 20,000 copies per week). Although the Windfall Profits Tax may have been the quid pro quo for deregulation, other more favorably perceived industries have been deregulated without being required to pay a compensatory tax.

37. This is not to say that industries protected by the First Amendment necessarily make more money, because (assuming price competition) a benefit available to all

some of the costs of a constitutional provision that benefits them disproportionately does not seem inherently unreasonable.

All of this suggests that were *New York Times* to be reversed, or were the *New York Times* rule to be applied less stringently, it is by no means inevitable that the news and editorial functions of newspapers and magazines would be appreciably more constrained, for it is possible that one consequence of that reversal would be the same degree of editorial freedom but slightly lower after-suit profits for publishers. Of course, it is highly likely that many publishers would refuse to bear the costs of the First Amendment in this way. And if we as a society are concerned with the social benefit of editorial freedom more than the benefits to the press itself, then we must accede to this threat. But now we see that Leonard Damron has to bear the \$22,000 cost for our First Amendment not because this is necessary in order to preserve the First Amendment, but because either Leonard Damron or the publishers of newspapers have to bear that cost in order to preserve the First Amendment, and publishers have refused and are likely to continue to refuse to do so. *New York Times* is thus the consequence of the Supreme Court's having been persuaded that the only alternative to less First Amendment protection was placing the cost on people like Damron, when in fact there was the alternative of placing the cost of the First Amendment on the newspaper itself.³⁸

members of the industry will produce not higher profits, but simply a different equilibrium. To the extent that there is less than perfect competition, however, the First Amendment-prompted elimination of what would otherwise be a financial burden ought to produce an increase in profits.

On occasion, the media also employs First Amendment rhetoric in order to secure from legislatures privileges not yet available from the courts' interpretations of the First Amendment. Two prominent examples are shield laws, compare Cal. Evid. Code § 1070 (Deering 1986) (immunity from contempt citations), and Ill. Ann. Stat. tit. 38, para. 108-3(b) (Smith-Hurd 1979) (limited immunity from search warrants) with *Branzburg v. Hayes*, 408 U.S. 665, 682-90 (1972) (First Amendment does not exempt reporters from responding to grand jury subpoenas), and the partial exemption from the antitrust laws, compare the Newspaper Preservation Act, 15 U.S.C. §§ 1801-1804 (1970) (exempting joint operating agreements between newspapers from antitrust laws) with *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139-40 (1969) (First Amendment provides no automatic immunity from antitrust laws). In this sense the press may derive an indirect benefit from the First Amendment by having available to it rhetorical tools not available to less constitutionally favored industries. Still, other industries, such as the legal profession, the medical profession, and the defense industry, have available to them rhetorical tools based on the special importance of their industries. Because there is no reason to believe that the rhetorical force of the press clause is greater than the rhetorical force of other industry-wide social benefits, I will not rely in what follows on any rhetorical advantages in public debate that may be possessed by enterprises closely linked with the First Amendment.

38. The magnitude of the award (\$500,000 in that case and potentially even more as a result of a number of similar actions pending, see *infra* note 40) would have made this seem an implausible alternative in *New York Times* itself. Had the award been sufficiently smaller, however, it might have occurred to the Court (or to Sullivan's lawyers) to argue that the *Times* could have absorbed the cost of the judgment (and the

II.

But suppose the alternative of forcing publishers to bear the financial burden of the First Amendment is unrealistic. If, as appears increasingly the case, publishers are not willing to insulate their editorial departments from the pressures of advertising-revenue preservation,³⁹ then publishers are probably not willing to insulate their editorial departments from the pressures of liability minimization.⁴⁰ And there is little doubt that some publishers would be financially unable to do so even if they desired. Most publications simply do not have the resources presumably available to the *New York Times*.

Moreover, the economics of information are such that the production of most single items of new information bring, especially for a newspaper, small financial benefits (even though the publication of a single item can produce a large harm to, or a large benefit for, the object of that article). Because information cannot in general be monopolized once published, because published information can be used by others at virtually no cost, because each item of information published brings a minuscule economic benefit to the publisher, and because a single item of published information may nevertheless result in great liability, the production of any new piece of information brings for its publisher much greater risk of liability than potential for benefit. As a result, the extent to which the risk of liability might overdeter producers from producing new commodities is greater when information rather than some other newly produced good, especially one that can either be patented or that is difficult for others to reproduce, is the relevant commodity. Consequently, a publisher's commitment to insulating its editorial department from financial pressures would have to be greater than it would be in enterprises equally committed to production of new commodities but engaged in the production of commodities other than information. This may explain the seeming erosion of the ideal of editorial independence from advertising pressures, and much the same could be expected with respect to pressures from liability minimization.

In addition, if we are truly dealing with a social benefit, then there seems little more reason to pin the cost of it on the publishers of the

First Amendment), with consequently no loss of editorial freedom (assuming the decision not to exclude political advertisements because of their potentially defamatory content is an aspect of editorial freedom).

39. See authorities cited *supra* note 30.

40. Still, the very fact that *New York Times* was premised on the media's denial of one of its own central principles seems worthy of note. In light of the fact that the total exposure in *New York Times* was \$3,000,000 (two \$500,000 judgments and pending actions in the amount of \$2,000,000) in 1964 dollars, see *New York Times Co. v. Sullivan*, 376 U.S. 254, 278 n.18 (1964), this behavior is hardly surprising. Little in subsequent discourse has been limited to such cases, however, and thus the standard "chilling effect" rhetoric is premised on an editorial obeisance to financial pressures that in other contexts the press is at such pains to deny.

Ocala Star-Banner than there is to pin it on Leonard Damron. And here we can again draw interesting comparisons between the press and other industries. Consider what happens when a federal agency requires automobile manufacturers to add airbags or a state or local agency requires landlords to provide fire protection equipment. Do landlords say that society will be better off if fewer tenants are burned, and thus absorb the costs of the improvements? Do automobile manufacturers say that society will be better off if there are fewer highway deaths, and thus diminish their profits by the cost of the airbags? Hardly. In tried and true American fashion, automobile manufacturers and landlords attempt to pass these costs along to the consumers, who then pay for safety whether they would have otherwise chosen to do so or not.

Following this pattern, we can imagine the same behavior in the case of newspapers and magazines. At least with respect to those publications that are sold to consumers (and here radio and television are relevantly different from newspapers and magazines, because the costs of radio and broadcast television are not levied directly by the broadcasters on listeners or viewers), one possibility is simply to increase the price of the newspaper to cover the \$22,000. Or, a publisher could raise the price of the newspaper by an amount sufficient either to pay for libel insurance or to establish a reserve sufficient to satisfy judgments and defense costs consequent upon the existence of a negligence rule rather than the *New York Times* rule.⁴¹

This approach requires assumptions about price elasticity that get a bit tricky. Although it is probably the case that, within the range sufficient to pay for the difference between the *New York Times* rule and a negligence rule, the demand for any given newspaper is comparatively price inelastic relative to many other consumer goods, it is unlikely to be totally price inelastic.⁴² And it turns out that the demand for advertising is quite sensitive to changes in circulation.⁴³ So if a newspaper

41. One way of thinking of this is as a self-imposed tax, in which the proportions of the tax burden borne by readers and by owners, respectively, will be determined by the elasticity of demand, which I discuss immediately below.

42. See Benjamin N. Compaine, *The Newspaper Industry in the 1980s: An Assessment of Economics and Technology* 32, 33 (1980); Herbert Hovenkamp, *Vertical Integration by the Newspaper Monopolist*, 69 *Iowa L. Rev.* 451, 455 & n.20, 456 & n.21, 457 & n.28, 458 (1984); W. Duncan Reekie, *The Price Elasticity of Demand for Evening Newspapers*, 8 *Applied Econ.* 69, 78 (1976). The perception of increasing price inelasticity is echoed by a number of investment analysts specializing in the newspaper industry. See Mark Calvey, *Making Money in Mutuals*, *Investor's Daily*, Apr. 23, 1991, at 19. Questions of the price elasticity of the demand for newspapers have occasionally appeared in the case law. See, e.g., *Dunn v. Phoenix Newspapers, Inc.*, 735 F.2d 1184, 1190 (9th Cir. 1984) (antitrust); *Neugebauer v. A.S. Abell Co.*, 474 F. Supp. 1053, 1061, 1070 n.11 (D. Md. 1979) (same).

43. See J. Ferguson, *The Advertising Rate Structure in the Daily Newspaper Industry* 52-53 (1963); Hovenkamp, *supra* note 42, at 455-56. According to the brief filed by the American Newspaper Publishers Association in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), the average line rate for advertising in a newspaper with a daily

with a daily circulation of 100,000 raised its price five cents (from thirty to thirty-five cents) to create the just-described reserve, if it used the entire proceeds of the increase to fund the reserve, and if as a result of the price increase the circulation slipped to 95,000, the costs to be absorbed by the paper would not only be the \$1500 per day caused by the loss of sales of 5000 newspapers at thirty cents. They would also include the loss of advertising revenue that followed from having a circulation of 95,000 rather than a circulation of 100,000.⁴⁴

Still, it is not inconceivable that the price increase would cover the advertising decrease as well.⁴⁵ After all, a five-cent-per-day price increase for a daily newspaper with a circulation of 100,000 would generate additional circulation revenue of \$1,186,250, assuming a reduction of circulation to 95,000.⁴⁶ The question then would be whether this additional circulation revenue would be sufficient both to pay for the increased libel insurance as well as to compensate for lost advertising revenue, the amount of the latter being a function both of the elasticity of demand for advertising with respect to circulation, and the price elasticity of demand for advertising. But it does not seem unrealistic to suppose that it would be enough both to pay for a negligence rule and to offset any lost advertising revenues occasioned directly or indirectly by the price increase.⁴⁷

circulation of 50,000 was 22.1 cents; for a daily circulation of 100,000 it was 34.8 cents; for 200,000 it was 56.1 cents; and for 500,000 it was \$1.169. Brief of American Newspaper Publishers Association, as Amicus Curiae, at 5, *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (No. 43).

44. The figures in this example presuppose a demand elasticity of about 0.30, which is roughly what is suggested by the relevant literature. See Randolph E. Bucklin et al., *Games of Survival in the U.S. Newspaper Industry*, 21 *Applied Econ.* 631, 640-41 (1989); James N. Dertouzos & William B. Trautman, *Economic Effects of Media Concentration: Estimates from a Model of the Newspaper Firm*, 39 *J. Indust. Econ.* 1 (1990).

45. The possibility that advertisers would be willing to pay for part of the costs of the First Amendment by paying the same price for 95,000 as for 100,000 readers seems too small to justify more than a brief footnote. Still, insofar as there is little cross-elasticity of demand among advertising media (advertisers being willing to pay more for newspaper advertising rather than switch to billboards, for example), then advertisers faced with increased costs by all newspapers or all magazines would be compelled to absorb part of the costs of the First Amendment.

46. This is the difference, per 365 issue year, between 100,000 newspapers a day at thirty cents and 95,000 a day at thirty-five cents.

47. One might wonder why, if an increase in newspaper selling price would produce a net increase in revenue, even taking into account reduced circulation and reduced advertising revenue, newspapers do not raise their prices now. I offer four possibilities, all consistent with the analysis in the text: (1) newspapers might be competing more in the long run than in the short run, and thus in the short run might be attempting to maximize sales (subject to a profit constraint) rather than to maximize profits; (2) higher circulation might be perceived by newspaper managers to have "impact" value independent of its economic effects, and managers (although perhaps not profit-maximizing shareholders) might consider impact value worth pursuing in its own right; (3) if (1) or (2) is correct, then newspaper managers might be more likely to

So although the foregoing discussion depends on a number of debatable assumptions about the nature of the market and price elasticity within it, it is not totally implausible to suppose that the costs of the First Amendment could be passed on to and spread out among readers. In implementation, this would mean that the prevailing rule would be a negligence rule, the effect of which would be that Leonard Damron would be able to recover his \$22,000 and thus not have to shoulder the costs of the First Amendment alone. But because the price increase would pay for any expenditures under the negligence rule that would not have been incurred under an actual malice rule, there would be no reason (other than engaging in the hardly unheard-of practice of passing on to consumers additional "costs" not actually expended) for internal editorial practices to be any different than they now are under the actual malice rule. In other words, *New York Times* protection would be available even if its price were paid not by Leonard Damron but by the purchasers of the newspapers, in some sense a much more logically constituted group of First Amendment beneficiaries.⁴⁸

III.

I assumed in the previous section that if the consumers of newspapers were able to absorb the difference between the costs of a negligence rule and the costs of the *New York Times* rule, then Leonard Damron and others similarly situated would be able to recover with no additional chilling on newspapers beyond that now tolerated under the *New York Times* rule.⁴⁹ The same assumption, however, would hold if

overassess than to underassess the negative economic consequences of a slight circulation loss; and (4) (the possibility I find most plausible, at least where there are competitive markets) there are substantial competitive risks for individual newspapers involved in raising prices when their competitors have not raised prices, risks that would be eliminated if a change in the relevant liability rules caused everyone's costs to rise a roughly equivalent amount.

48. Much the same purpose could be served by governmental imposition of a First Amendment tax on the sale of newspapers, with the proceeds going into a pooled insurance fund rather than to the individual newspapers. This possibility—in some sense public financing of the First Amendment with the costs borne only by newspaper (and other periodical) purchasers—is actually more of a variant on the public financing ideas in the next section, so I will say no more about this here.

49. I know that the press, for example, cannot accurately be described as "tolerating" the *New York Times* rule, in light of recent complaints that even that rule is excessively restrictive. See, e.g., David A. Anderson, Is Libel Law Worth Reforming?, 140 U. Pa. L. Rev. 487, 488 (1992) ("[A]ctual malice rule of *New York Times v. Sullivan* does not adequately protect the press."); Rodney A. Smolla, Let the Author Beware: The Rejuvenation of the American Law of Libel, 132 U. Pa. L. Rev. 1, 12-14 (1983) (claiming that Supreme Court's efforts to create coherent body of defamation law have failed and led to increased libel litigation); Reforming the U.S. Libel Law System, Communiqué (Freedom Forum Media Stud. Ctr., New York, N.Y.), Jan. 1992, at 1 ("The solution to the abuse of libel law by public officials and celebrities, people who have high influence in society as well as high access to media outlets, is to bar these prospective plaintiffs from seeking redress through libel litigation . . ."). But that question is not

the costs of the difference were borne not by consumers, but by the public at large.

Consider more closely the institution of libel insurance.⁵⁰ As it now exists, libel insurance is purchased by most publications, the major exception being a few large publishers who act as self-insurers. Some publishers purchase the insurance on an individual basis, but more commonly it is made available through media trade associations such as the National Newspaper Association and the National Association of Broadcasters.⁵¹ Libel insurance holds out the promise of partial spreading of the risk of libel judgments, but it is problematic in two related ways. First, it typically comes with a very high deductible, such that the obligation to pay the first, say, \$50,000 or \$75,000 of defense costs⁵² remains quite a heavy burden for small publishers.⁵³ Second, libel defense costs can be quite high, and one of the consequences of high defense costs is a rapid escalation in the costs of libel insurance, thus possibly making libel insurance increasingly unavailable to smaller

relevant to my analysis. What is at issue is the contrast between a rule that is more press-protective and another that is less. The question is whether the more press-protective rule, whatever it is, is necessary to secure the desired degree of editorial aggressiveness, as opposed to adopting the less press-protective rule, but having the cost difference between the two rules borne by someone other than the press itself.

50. See generally Practicing Law Institute, *Media Insurance and Risk Management* (1985) (handbook on management of media litigation costs); Richard A. Ek, *Libel Insurance*, in Harold A. Nelson & Dwight L. Teeter, *Law of Mass Communications* 666 (2d ed. 1973) (discussing trends in media libel insurance); Marc A. Franklin, *Suing Media for Libel: A Litigation Study*, 1981 *Am. B. Found. Res. J.* 795 (study of 291 libel cases brought against media defendants); Marc A. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 *Am. B. Found. Res. J.* 455 (study of 534 defamation cases); Henry R. Kaufman, *Trends in Damage Awards, Insurance Premiums and the Cost of Media Libel Litigation*, in *Cost of Libel*, supra note 23, at 1 (discussing "chilling effect" of libel insurance premiums).

As far as I know, first-party libel insurance, pursuant to which a libeled individual would be compensated by her own insurance company, is neither available nor a realistic option. If it were otherwise, the analysis would change somewhat, since such insurance would call into question the premise of uncompensated injury.

51. See Alex S. Jones, *U.P.I. Seems To Be Nearing a Moment of Truth Again*, *N.Y. Times*, Mar. 16, 1992, at D1, D8 (describing participation in libel insurance as one of the benefits of membership in the new Newspaper Association of America, which from April 24, 1992 will be the successor to the American Newspaper Publishers Association and seven other organizations); see also Kaufman, supra note 50, at 12-13 (group libel insurance economically more feasible).

52. This is the general order of magnitude of the deductible, probably based in part on the desire of the insurance companies to make sure that newspapers retain an incentive to be careful. In addition, most policies require the insured to bear part of the defense costs, presumably because insured publications usually insist on more of a say in defense (and settlement) strategy than is the case for many other insured enterprises. See Larry Worrall, *Libel Policy Deductibles and Limits*, in *Media Insurance and Risk Management* (1985), 147, 149-55.

53. See Martin Garbus, *The Cost of Libel Actions—Pressure Not to Publish*, *N.Y. L.J.*, July 17, 1986, at 1, 4.

publishers.⁵⁴

That libel insurance as now constituted disproportionately burdens smaller publishers suggests that libel might be a fruitful area for governmentally subsidized insurance not unlike federally subsidized flood insurance.⁵⁵ If editorial freedom is a public benefit, then we ought to consider seriously the possibility that the public should pay for or subsidize libel insurance much as it does flood insurance. Were this to happen, and if the government were to subsidize the difference between the cost of libel insurance at negligence rates and its cost at actual malice rates, then publishers could operate as they now do under the actual malice rule, but Leonard Damron and others similarly situated could recover upon a showing of no more than negligence.

Three obstacles are most apparent. First is the problem of moral hazard, the phenomenon whereby insured agents take excess risks (especially at subsidized rates) precisely because of the existence of insurance, as when federally subsidized flood insurance causes more construction in flood-risk areas than would otherwise be the case.⁵⁶ But in the context of retaining the benefits of minimizing the chilling effect, the question of moral hazard is almost uniquely inapt, for the *New York Times* rule is premised on promoting precisely the kind of risky behavior that in most other contexts is a cause for concern (thus the term *moral hazard*). Hence, what would otherwise be a worry about excess risk-taking by insured agents is not only not a worry when the agent is the media operating in the area of public affairs, but is under our First Amendment assumptions actually a positive good.⁵⁷

54. See David A. Barrett, Declaratory Judgments for Libel: A Better Alternative, 74 Cal. L. Rev. 847, 858 (1986); Kaufman, *supra* note 50, at 12.

55. National Flood Insurance Act of 1968, 42 U.S.C. §§ 4001-4128 (1988 & Supp. II 1990) (establishing an insurer pool for what would otherwise be high-risk flood insurance, and providing for federal subsidies to the pool to reduce the premiums from what they would be were they based solely on the real actuarial risk). If subsidized flood insurance is premised on the existence of a market failure flowing from a greater federal interest in having people live in flood plains than the people who would live there can afford to pay, then so might subsidized libel insurance be said to advance the "federal" or public interest in unchilled debate.

56. See Christopher K. Leman & Robert H. Nelson, The Rise of Managerial Federalism: An Assessment of Benefits and Costs, 12 *Env'tl. L.* 981, 1006 (1982). On the moral hazard problem elsewhere in the law, see Lawrence Blume & Daniel L. Rubinfeld, Compensation for Takings: An Economic Analysis, 72 Cal. L. Rev. 569, 593-94 (1984); Ronald A. Cass, Principle and Interest in Libel Law After *New York Times*: An Incentive Analysis, in *Cost of Libel*, *supra* note 23, at 69, 97-98; Louis Kaplow, An Economic Analysis of Legal Transitions, 99 Harv. L. Rev. 509, 537-42 (1986). On moral hazard generally, see Mark V. Pauly, Overinsurance and Public Provision of Insurance: The Roles of Moral Hazard and Adverse Selection, 88 Q.J. Econ. 44 (1974); Mark V. Pauly, Comment, The Economics of Moral Hazard, 58 Amer. Econ. Rev. 531 (1968); Steven Shavell, On Moral Hazard and Insurance, 93 Q.J. Econ. 541 (1979).

57. It is possible that subsidized insurance would raise risk-taking beyond the presumably optimal level set by *New York Times* (which, after all, did not totally eliminate the law of libel), but there seems so little room between *New York Times* and no liability

Second, libel insurance involves a conflict between the interests of the insurer and the interests of the insured. Even now there is a recurring problem when insurers are willing to settle libel actions to minimize costs while publisher-defendants are unwilling to have them settled for reasons of principle or "journalistic honor."⁵⁸

In itself, this situation does not seem unduly problematic, for since by hypothesis if subsidized libel insurance is in place, then the incentive for a publisher to resist the settlement is based on a matter of principle and not a matter of cost-saving. Now there is nothing wrong with this, but there is no reason to believe that the First Amendment insulates publishers (or anyone else) from criticism of their publications or their methods of doing business. There can be little doubt that "uninhibited, robust, and wide-open"⁵⁹ debate may include debate about press performance, and there can be equally little doubt that such debate may itself affect the communications of those whose performance is criticized. But if the chilling effect of criticism uncoupled from financial liability remains outside of the purview of the First Amendment—and nothing in the case law suggests otherwise—then there is no reason to suppose that press resistance to settlements (that would not cost them anything) on grounds of principle should be treated any differently from press resistance to criticism on grounds of principle. Thus, only by adopting the untenable position that the First Amendment insulates publishers from financially inconsequential criticism does a settlement that the publisher does not wish to make entail the deterrence that *New York Times* is designed to eliminate.⁶⁰

The final and most substantial objection, however, is that federally

that this does not appear to be a great problem. In some sense the lesson of *New York Times* is applicable far beyond the limited domain of the First Amendment, because in most areas subject to liability the optimal liability rule is based in part on the view that excess deterrence is suboptimal, assuming some social worth for the activities subject to the liability rule. In other words, we actually desire some negligent behavior, in the sense that we do not desire to eliminate all of it for fear that in doing so we will eliminate, or chill, some socially desirable behavior as well. See Mark F. Grady, *Multiple Tortfeasors and the Economy of Prevention*, 19 J. Leg. Stud. 653 (1990).

58. See Cass, *supra* note 56, at 97–98; Kaufman, *supra* note 50, at 10–11. This is not to deny that publishers (shareholders) may have good reputation-related reasons for resisting a settlement. But even after the publisher has decided that, even accounting for reputation, a settlement is appropriate, then, as Cass argues, editorial resistance to settlement may be detrimental to stockholders or publisher-owners insofar as the decision to defend is motivated by managers' interests in avoiding the supposedly negative professional stigma of having been the cause of a successful (for the plaintiff) libel action. See Cass, *supra* note 56, at 79. Publishers also claim that part of the reason for resisting settlement is to discourage future litigation, but since the insurer has the same interest as the insured in discouraging future lawsuits (at least assuming a long-term contract), this factor drops out when a publisher resists a settlement that the insurer, presumably taking into account the settlement's effect on future litigation, still wishes to pursue.

59. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

60. In the instant context, the publisher has, by hypothesis, been negligent. In such

funded or subsidized insurance could create a federal interest in reducing insurance payouts so as to reduce the federal government's exposure to the increase in insurance rates that would follow from an increase in payouts. Just as we would now expect the federal government to be more concerned with flood control than it would be were it not financially interested in minimizing the amount of flood damage,⁶¹ so too is there a worry that a federal government financially interested in minimizing the amount of libel damages would be inclined to exercise more control over content and procedures than the First Amendment does and ought to permit.

The risk that government interest in minimizing press liability could bring increased regulation is real, but a decrease in the punitive component of libel damages could more than counterbalance it by lessening the government's exposure (and therefore its interest). Some of this decrease could come simply from adopting the widely urged view that punitive damages should be eliminated in libel cases, and/or that a general cap on the amount of libel damages should be imposed.⁶² In addition, however, it is likely that awarders of damages factor some punitive component into the allegedly compensatory component of tort

a case *New York Times* may establish why the publisher should not lose money, but it does not stand for the proposition that the publisher should not lose face.

A more significant complication, however, is the possibility that insured defendants, especially those uninfluenced by the professional norms of the elite media, will underdefend those suits that are brought, or will under-cooperate where others (insurers, the government) are defending in their name. My guess is that damage limitations, see *infra* note 62, which reduce both the incentives to sue and the incentives of plaintiffs' attorneys working on a contingent fee basis, are a countervailing force of about the same size.

61. See, e.g., 42 U.S.C. §§ 4022, 4102 (1988).

62. There is some likelihood that governments interested in minimizing the amount of libel damages would have a greater interest than they now do in eliminating punitive damages in libel cases. Even without that factor, however, damage limitations (whether by imposition of a damage cap or by elimination of punitive damages) have been supported by a wide range of commentators on the operation of contemporary libel law. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 771 (1985) (White, J., concurring) (suggesting that limiting damages to level that would not unduly threaten press would better serve both reputational and First Amendment interests); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 77 (1971) (Harlan, J., dissenting) (suggesting punitive damages for libel are unconstitutional without "a reasonable and purposeful relationship to the actual harm done"); David A. Anderson, Reputation, Compensation, and Proof, 25 Wm. & Mary L. Rev. 747, 755-56 (1984) ("The doctrine of presumed harm permits recovery when no injury to reputation has occurred . . . [and] when injury . . . has occurred . . . permits awards unrelated to the magnitude of the injury."); Epstein, *supra* note 18, at 815 (suggesting that libel reform include use of declaratory relief and damages limitations); Kaufman, *supra* note 50, at 10 (discussing declaratory judgments as means of eliminating threat of large damage awards); Anthony Lewis, *New York Times v. Sullivan* Reconsidered: Time to Return to "The Central Meaning of the First Amendment," 83 Colum. L. Rev. 603, 615-17 (1983) (advocating limits on compensatory and abolition of punitive libel damages); Schauer, *supra* note 13, at 928 n.102 ("Excessive awards are a problem.").

awards, a phenomenon most probable when compensatory awards for non-monetary injuries render the hidden punitive damages essentially invisible.⁶³ Because the threshold question on liability in *New York Times*-governed libel actions now requires conduct as egregious as publication in the face of actual knowledge of falsity, the temptation to punish once liability is found seems considerable.⁶⁴ If the standard of egregiousness for a finding of liability were lower, however, as would be the case under a negligence rather than an actual malice rule, it is likely that the temptation to award hidden punitive damages would be reduced *pro tanto*.⁶⁵ Moreover, the willingness to inflate awards for punitive purposes might decrease (as might the value put on awards in general) with public, and therefore juror, awareness of the actual source of the awards. And finally, since such a scheme would exist only with a public and a government more willing to pay for the First Amendment than they are now, the conditions under which such a scheme would actually be in place are also conditions in which the risks of content control are likely to be the smallest.

IV.

Some of the costs of even subsidized libel insurance, and perhaps even some of the risks, could be decreased by moving the publisher out of the defendant category entirely. Because insurance is a system for spreading risk, and because the subsidy in subsidized insurance itself spreads the risk, many of the same goals could be achieved by having the subsidy but not the insurance. That is, if public absorption of the costs of compensating speech-caused damage is the goal, then that goal could be served by a victim compensation scheme as easily as by insurance.

Although much of what can be said here is the logical next step in the foregoing discussion of defamation and the news media, I want to shift examples, because now the import of some of these possibilities is broader. Not only is something like a victim compensation scheme worth contemplating with respect to defamation; it is also worth contemplating with respect to cases involving physical (or otherwise compensable) injury in some way assisted by an act of communication

63. Other than providing an increased incentive to sue, there seems little reason why punitive damages, even when awarded, should go to the plaintiff, and here the argument for uncoupling seems especially strong.

64. See Epstein, *supra* note 18, at 807-08.

65. Even under a negligence regime, a plaintiff could still introduce evidence of grossly appalling conduct. Without a legal rule focusing on the actual malice issue, however, the same conduct would likely receive a less pejorative characterization, and of course in many cases the grossly appalling conduct would simply not be present. Thus the punitive component might decrease slightly even in those few cases now actionable under the actual malice rule, and there is some reason to believe it would be less prominent in cases not now actionable (when public officials or public figures are the plaintiffs) in which only negligence could be shown.

protected by the First Amendment. In order to shift to this type of case, let us examine the most salient features of *Herceg v. Hustler Magazine, Inc.*⁶⁶ and *Olivia N. v. National Broadcasting Co.*⁶⁷ In *Herceg*, a fourteen-year-old boy was found hanging in a closet in his room, with a copy of *Hustler* on the floor beneath his feet, opened to an article entitled "Orgasm of Death." The article detailed the procedures for auto-erotic asphyxiation, and contained warnings that the practice should not be attempted by the reader.⁶⁸ The boy's mother sued *Hustler* for wrongful death and related torts, but the district court dismissed the complaint on First Amendment grounds. An amended complaint based on an incitement theory produced a jury verdict of \$69,000 in actual damages and \$100,000 in exemplary damages,⁶⁹ but that verdict was reversed by the Fifth Circuit, also on First Amendment grounds. The court held that the *Brandenburg*⁷⁰ requirement of "incitement," meaning either an intention to have the event occur or the use of explicit words directed to that end,⁷¹ could not have been satisfied here. Since there was no claim that the boy's death was *desired* by *Hustler*, no degree of negligence and proximate cause, even in the face of reasonable foreseeability, could, the court held, dispense with strict application of the *Brandenburg* incitement standard.⁷²

66. 565 F. Supp. 802 (S.D. Tex. 1983), motion to dismiss denied, 583 F. Supp. 1566 (S.D. Tex. 1984), rev'd, 814 F.2d 1017 (5th Cir. 1987), cert. denied, 485 U.S. 959 (1988).

67. 178 Cal. Rptr. 888 (Ct. App. 1981), cert. denied sub nom. Niemi v. National Broadcasting Co., 458 U.S. 1108 (1982).

68. See *Herceg*, 814 F.2d at 1018. For a somewhat similar set of facts, but in the context of a more mainstream communication, see *DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036, 1037-38 (R.I. 1982) (death of a fourteen-year-old boy who hung himself in imitation of a stunt man performing on "The Tonight Show").

69. See *Herceg*, 814 F.2d at 1019. The friend who first discovered the body also sued and was awarded \$3000 in actual damages and \$10,000 in exemplary damages for his pain and mental suffering upon seeing the body.

70. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

71. The actual words used by the Court in *Brandenburg* to describe this facet of the *Brandenburg* test are "directed to inciting or producing." 395 U.S. at 447. There is some uncertainty as to whether this phrase encompasses cases in which the speaker intends that the result that comes about is unmistakable to the audience, although words explicitly urging the unlawful act are not employed. On this and related issues, see generally Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 Stan. L. Rev. 719 (1975) (distinguishing Hand's imminence test from Holmes' clear and present danger test); Hans A. Linde, "Clear and Present Danger" Reexamined: Dissonance in the *Brandenburg* Concerto, 22 Stan. L. Rev. 1163 (1970) (necessity of reference to empirical circumstances to meet clear and present danger test); Frank R. Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—and Beyond*, 1969 Sup. Ct. Rev. 41 ("[O]nly the danger test can provide assurance that enclaves of constitutional immunity for the individual will not be invaded."); Staughton Lynd, Comment, *Brandenburg v. Ohio: A Speech Test for All Seasons?*, 43 U. Chi. L. Rev. 151 (1975) (*Brandenburg* imminence test appropriate in institutional setting).

72. See *Herceg*, 814 F.2d 1023-25.

The doctrinal conclusion was similar in *Olivia N. v. National Broadcasting Co.*, in which the Supreme Court of California held that even where the television movie *Born Innocent*, describing a rape using a "plumber's helper," had caused just such a rape of a nine-year-old girl by a group of teenage boys who had seen *Born Innocent* shortly before,⁷³ the rule in *Brandenburg* immunized NBC, since no intent to injure could be shown.⁷⁴ The court's fear was that a contrary result would induce a degree of broadcaster and publisher caution inconsistent with the goals of the First Amendment.⁷⁵

In both of these cases, especially *Herceg*, there was probably sufficient proximate cause, reasonable foreseeability, and negligence to permit recovery under existing tort law.⁷⁶ Thus what would otherwise have been a compensable event went uncompensated because of the application of First Amendment doctrine.⁷⁷ But because *Herceg* in-

73. See *Olivia N. v. National Broadcasting Co.*, 178 Cal. Rptr. 888, 891 (Ct. App. 1981), cert. denied sub nom. *Niemi v. National Broadcasting Co.*, 458 U.S. 1108 (1982).

74. See id. at 94.

75. See id. at 92. As in *Herceg*, the causal chain between one act of communication and one act of violence was quite close, and thus these cases differ from the more attenuated claims in *Zamora v. Columbia Broadcasting Sys.*, 480 F. Supp. 199, 200-01 (S.D. Fla. 1979) (claim that general television violence led to decedent's murder barred by First Amendment and dismissed for failure to state claim).

76. For a typical case allowing recovery against a manufacturer despite intervening misuse of the product by the consumer, see *LeBouef v. Goodyear Tire & Rubber Co.*, 451 F. Supp. 253, 257-58 (W.D. La. 1978), aff'd, 623 F.2d 985, 989 (5th Cir. 1980), upholding a wrongful death award to a driver caused by a tire that disintegrated, despite the fact that the driver at the time of the accident was highly intoxicated and driving at approximately 105 miles per hour. For other cases holding that misuse by the consumer does not relieve the seller of liability if the misuse was reasonably foreseeable, see *Larsen v. General Motors Corp.*, 391 F.2d 495, 502-05 (8th Cir. 1968); *Back v. Wickes Corp.*, 378 N.E.2d 964, 969-70 (Mass. 1978); *Beatty v. Schramm, Inc.*, 458 A.2d 127, 129 (N.J. Super. Ct. App. Div. 1983). For general discussions, see W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 33, at 197-203, § 44, at 303-19 (5th ed. 1984 & Supp. 1988); Marshall S. Shapo, *The Law of Products Liability* ¶¶ 21.01-.09 (1987). Thus, whatever might be thought about the undesirability of imposing responsibility on any agent other than the one most proximately responsible for the injury, this view ("guns don't kill people, people kill people") has been rejected in vast areas of American law, of which Dram Shop Laws imposing liability on sellers of alcoholic beverages for injuries caused by consumers of those beverages are another example. Still another is the prevalence of vicarious liability for owners of automobiles negligently operated by others. See, e.g., *Young v. Masci*, 289 U.S. 253, 257-61 (1933) (automobile owner's liability for injuries resulting from negligent operation by another in a different state does not violate due process); *Wolf v. Sulik*, 106 A. 443, 444-45 (Conn. 1919) (husband's use of wife's car is intended use for which she is liable).

77. Let me emphasize here that in an important way what I suggest is substantially more restrained than much of the thrust of modern tort reform. A number of existing proposals are quite properly characterized as "no fault" proposals and thus constitute significant changes from the "no fault, no foul" assumptions of traditional tort law. See, e.g., Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 Va. L. Rev. 774, 802-03 (1967) (auto accident victims); Robert E. Keeton, *Compensation for Medical Accidents*, 121 U. Pa. L. Rev. 590, 613-17 (1973)

volved a victim who was himself the reader, I want to construct an example that will combine the proximate cause and foreseeability of *Herceg* with the third-party harm in *Olivia N.* I do this not to create a particularly grotesque fact pattern, but rather to demonstrate that there might be a non-empty set of cases in which cost-shifting seems not totally implausible. So suppose we produce a hypothetical case called *Olivia N. v. Hustler Magazine*. In this case, a group of fourteen-year-old boys raped a nine-year-old girl using a "plumber's helper." When apprehended, the boys were in possession of a copy of *Hustler* magazine detailing just such a crime, describing the pleasure likely to be gained from committing it, and maintaining that the victims of such crimes derive more pleasure from the act than their protestations might indicate.

On these facts, a jury applying accepted principles of tort law could in most jurisdictions find proximate cause against the magazine as well as the boys, and could find negligence on the part of the magazine in not taking account of this highly foreseeable misuse by intervening agents.⁷⁸ A jury could therefore be justified, but for the application of existing First Amendment doctrine, in awarding damages to Olivia N. in the amount of, say, \$20,000. But if *Brandenburg* were applied as it was in the real *Herceg* and the real *Olivia N.*, then the award would be reversed, with the consequence that preserving the value of the First Amendment costs the hypothetical Olivia N. \$20,000.

The same question recurs. Why Olivia? If it is "our" First Amendment, then why don't *we* and not Olivia N. pay for it?⁷⁹ And when

(medical malpractice); Richard A. Merrill, Compensation for Prescription Drug Injuries, 59 Va. L. Rev. 1, 107-12 (1973) (drug injuries); Jeffrey O'Connell, Expanding No-Fault Beyond Auto Insurance: Some Proposals, 59 Va. L. Rev. 749, 789-94 (1973) (enterprise liability). Because what I suggest here presupposes the existence of an at-fault-but-immunized-by-the-First-Amendment agent, my suggestions fit more clearly within traditional tort law than do a number of reforms, some already in place, that have eliminated the fault requirement as a prerequisite for compensation.

78. There is precedent for the imposition of liability despite the First Amendment when the publication of a name and address is involved. See *Hyde v. City of Columbia*, 637 S.W.2d 251, 269-71 (Mo. Ct. App. 1982), cert. denied sub nom. *Tribune Publishing Co. v. Hyde*, 459 U.S. 1226 (1983); William W. Van Alstyne, First Amendment: Cases and Materials 181 n.71 (1991); Douglas O. Linder, When Names Are Not News, They're Negligence: Media Liability for Personal Injuries Resulting from the Publication of Accurate Information, 52 UMKC L. Rev. 421, 434-36 (1984) (discussing *Hyde* and its implications); see generally Steven J. Weingarten, Note, Tort Liability for Nonlibelous Negligent Statements: First Amendment Considerations, 93 Yale L.J. 744 (1984) (proposing liability scheme for negligent, nonlibelous misrepresentations). A First Amendment defense was also rejected in *Weirum v. RKO General, Inc.*, 539 P.2d 36, 40-41 (Cal. 1975), imposing liability based on sponsorship of a contest that encouraged listeners to take highway risks in an effort to be the first to locate the station's disc jockey as he travelled around the city broadcasting clues as to his whereabouts.

79. The question seems especially apt when, as is arguably the case in *Herceg* and *Olivia N.*, the protection is granted not so much because of the importance of granting it in those cases but because of the "slippery slope" risks that not granting it in those cases are thought to entail. See Frederick Schauer, Slippery Slopes, 99 Harv. L. Rev. 361, 363

presented on these facts, the possibility of just such a transfer of costs does not seem fanciful. Why could Olivia N. not be awarded \$20,000 by the state in much the same fashion as victims are compensated in other areas?⁸⁰ If there were a special victim's compensation scheme for cases in which only the First Amendment prevented recovery, and if claims against the fund required neither prior recovery against the publisher nor subrogation to the state of a claim against the publisher, then the publisher would have no more reason to refrain from publishing an article with potential physical consequences than it does now. And if the administrators of the fund were authorized and allowed to compensate Olivia N. in the amount of \$20,000 upon the same showing that would have allowed a jury to award compensation against *Hustler*,⁸¹ Olivia N. would have the same \$20,000 with no greater effect than now on First Amendment values.⁸² The only difference would be that the public rather than Olivia N. would bear the \$20,000 cost.

Although the administrative costs and details of such a program would be formidable, and although the risks (such as, again, the risk of content control in order to minimize governmental exposure) would be significant, those risks should be measured against the costs under the status quo, pursuant to which an injury that would plainly be compensated but for the First Amendment goes uncompensated. In that sense, the baseline is one in which there are also risks, but risks to the Olivia N's of the world far greater than the risks to *Hustler* and its readers. So although it would be a mistake to ignore the risks of change, it is equally a mistake to ignore the less noticeable but no less real risks inherent in the present system.

Under existing crime victim compensation schemes, the major drawback is commonly seen as undercompensation. But if the baseline is not the supposedly "full" compensation ideal of tort law but the existing "no compensation" model of injuries caused by activities protected by the First Amendment, then even partial compensation can be viewed as improving the existing model rather than as falling short of

(1985). If we are denying liability not because we think that denial in those cases is intrinsically important to preserve the values of the First Amendment, but because we believe that denial in those cases reduces the risk that the First Amendment will be jeopardized in other cases, then the anomaly of imposing the costs on the likes of Olivia N. seems especially apparent.

80. See Paul F. Rothstein, *How the Uniform Crime Victims Reparations Act Works*, 60 A.B.A.J. 1531, 1531 (1974).

81. In some of these cases compensation might be available under existing victim compensation plans, but where there was only intervening negligence, and not intervening intent or criminality, the absence of a crime by anyone would preclude recovery under the standard victim compensation statute.

82. Although New Zealand is an exception, see Sugarman, *Doing Away with Tort Law*, *supra* note 12, at 629 n.317, most existing governmental compensation schemes do not compensate for pain and suffering and similar non-out-of-pocket damages. But even if claimants could recover only out-of-pocket costs, they would still be better off than they are under the existing approach.

an ideal. Even an award of \$5000 to Olivia N., perhaps based on paying only medical and other out-of-pocket expenses, is still \$5000 more than she would recover under existing law.

Moreover, a partial compensation scheme has the potential of transforming the way we think about the First Amendment. No longer would we think that imposing its costs upon the victims of harmful speech is necessary, but we would see that social absorption of those costs remains a possibility. If society decided that it wanted to compensate Olivia N. \$5000 rather than \$20,000, it would then understand, as it probably does not now, both the costs of a free speech system, and that the \$15,000 difference is the result not of necessity but of a conscious choice about where society wishes the immediate burden of its rights to fall.

In this respect there are advantages to thinking the issue through in this way even if the conclusion is that no compensation scheme is viable at all. Although in some areas we do provide compensation for injuries, in others we do not. Although at times people who are compelled to make sacrifices for the public good are compensated (consider various veterans' benefits programs), at other times they are not (consider the operation of most zoning laws). My goal here is not, and cannot be, to provide a broad-based framework within which to analyze all possibilities and mechanisms for compensation when the costs of general social goods are disproportionately borne by a small subset of the population. Given that, it is quite possible that no plan for compensation would be generally desirable in the circumstances I have outlined. Because these are cases in which, but for the First Amendment, compensation would be awarded, such a conclusion seems itself debatable. But even if that is the proper conclusion, going through the steps focuses us much more sharply on the costs of the First Amendment, and on the identity of those who are paying for them.

V.

As the sentences concluding the previous part should make clear, the ideas I offer here are perhaps only in a narrow sense about defamation and about speech causally related to otherwise compensable physical harms. The advantage of commencing with these two areas is that they are ones in which alternative compensation schemes seem most practically plausible, in large part because they deal with areas in which existing law but for the First Amendment would allow recovery.⁸³ But

83. This is not to say that their enactment is likely. If free speech is primarily a public good, then it may be comparatively unlikely that legislatures or their surrogates would enact legislation to support it, as is argued in Ronald A. Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. Cin. L. Rev. 1317, 1365-66 (1988); Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 Harv. L. Rev. 554, 560-62 (1991); Richard A. Posner, *Free Speech in an Economic Perspective*, 20 Suffolk U.L. Rev. 1, 23-24 (1986). But, as my discussion

expanding the circle of thought outward from these two instances indicates further applications, perhaps more suggestive or metaphorical than concretely applicable, for the idea of uncoupling the protection of free speech from the compensation of its victims.

One example, as pressing as it is timely, is the general topic of hate speech, within which I include, first, utterances intended to and likely to have the effect of inducing others to commit acts of violence or acts of unlawful discrimination based on the race, religion, gender, or sexual orientation of the victim; and, second, utterances addressed to and intended to harm the listener (or viewer) because of her race, religion, gender, or sexual orientation.⁸⁴

I offer this somewhat tedious definition because these two varieties of hate speech are relevantly different in this context. The first, the case of advocacy of racial violence or racial discrimination, looks in some respects like the hypothetical *Olivia N. v. Hustler*. Suppose that a member of the audience at Frank Brandenburg's speech, call him Lester, becomes quite enraged, feels that the time for "revengeance," in Brandenburg's words,⁸⁵ is now, and then proceeds to use an axe handle to commit an act of revengeance against the first African-American he sees. The victim then proceeds to sue both Lester and Brandenburg for battery and seeks damages for medical costs and pain and suffering.⁸⁶ Although she knows that the action against Lester is legally easy, she knows that Lester's pockets are particularly shallow, so she also joins the substantially deeper but one-step-removed pockets of Brandenburg.

Now we know from *Brandenburg v. Ohio* itself that Brandenburg is likely to be found immune from liability, a result confirmed by *Herceg* and the real *Olivia N.* case.⁸⁷ Yet we know as well that there are circum-

of *New York Times Co. v. Sullivan* indicates, see *supra* parts I-III, much that I say here is also relevant to how courts think about the issues in designing *their* approaches to the First Amendment.

84. This latter category resembles the concern at issue in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2547-50 (1992). The Court's significant restriction on content-based remedies in *R.A.V.* suggests that the importance of uncoupling, of searching for nonrestricting forms of compensation, is now even greater.

My definitions of both types include intent to injure, but there could of course be "negligence" versions of both, although there would be differences of opinion as to whether the phrase "hate speech" should be used where negligence but not intent to injure exists.

85. See *Brandenburg v. Ohio*, 395 U.S. 444, 446-47 (1969) (per curiam).

86. Here I refer only to the pain and suffering that would be normally compensable for any physical injury, not the emotional pain and suffering attached to being attacked just because of one's race, religion, gender, sexual orientation, physical appearance, and so on.

87. In the widely publicized *Berhanu v. Metzger*, No. 8911-07007 (Cir. Ct., Multnomah County, Or., Oct. 22, 1990) (appeal pending), described in *Am. Law.*, Dec. 1990, at 25, a jury awarded nearly \$12.5 million against the leaders of the White Aryan Resistance, whose subordinates had responded to the leader's urging of racial attacks.

stances under which Brandenburg would be held responsible as a matter of tort law even though he is currently immunized by the First Amendment. This is parallel to my hypothetical *Olivia N.* case, so presumably anything I said about burden shifting for that case would apply to this racially oriented case as well.⁸⁸

But even were Brandenburg not liable as a matter of tort law, his utterances, when combined with those of many others, are still likely to have some effect on the level of racial violence. To put it more broadly, assume (a pretty safe assumption to me) that a wide range of constitutionally protected utterances, including but not limited to those of members of the Ku Klux Klan and related groups, have some effect on the level of racial violence and race discrimination in this country. Some of this effect may be in the form of provocations of those previously inclined towards racism, some may be in the form of reinforcement of existing attitudes that might otherwise be more susceptible to change, some may be because of the way in which speech coordinates the behavior of those who act only when they are confident that others will join in their actions, and some may be in the form of assistance in the creation of attitudes that in turn shape behavior. Assume as well that the existence of the First Amendment prevents the United States from having laws (such as laws prohibiting the incitement to racial hatred) that would make unlawful some of these utterances, laws of the kind that are common in many democratic societies.⁸⁹ And finally assume that the absence of such laws has an effect on the degree of proliferation of statements promoting racial violence or race discrimi-

Unlike some other cases, however, it was plain here that the defendants had both desired that the attacks happen and had used specific words of encouragement. But for the "imminence" requirement, therefore, the action against the Metzgers was consistent with *Brandenburg*.

88. Because it does not seem wise to create a compensation system that would create any disincentive to bring an action against the primary wrongdoer (Lester), it would be appropriate to have any form of public compensation conditioned both on the inability of the primary wrongdoer to satisfy the judgment, and on the existence of a secondary wrongdoer (Brandenburg) who would, but for the First Amendment, be liable in tort.

89. This seems especially clear after *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992). For examples of such laws in other countries and in international law, see Race Relations Act, 1976, ch. 74 §§ 30-31 (Eng.); Criminal Code, R.S.C., ch. C-46, §§ 318-319 (1985) (Can.); Brottsbalken [Penal Code], ch. 16, § 8 (Swed.), translated in Nat'l Swedish Council for Crime Prevention, *The Swedish Penal Code 45* (John Hogg trans., 1984); International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, art. 4, 660 U.N.T.S. 195. Additional examples are described in Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2341-48 (1989); Jordan J. Paust, *Rereading the First Amendment in Light of Treaties Proscribing Incitement to Racial Discrimination or Hostility*, 43 Rutgers L. Rev. 565, 565-68 (1991); Eric Stein, *History Against Free Speech: The New German Law Against the "Auschwitz"—And Other—"Lies,"* 85 Mich. L. Rev. 277, 281-87, 312-14, 322-24 (1986).

nation, which in turn has an effect on the degree of racial violence or race discrimination.

Each of these assumptions incorporates empirical propositions that could be otherwise.⁹⁰ My aim here is not to test these assumptions, however, but to explore their implications. And if the assumptions are sound, then the implication is that there is more race discrimination and racial violence than there would be if everything else about the First Amendment were the same except for its permission of advocacy of racial violence or race discrimination.⁹¹

If there is accordingly more racial violence and more race discrimination than there would have been under different understandings of the First Amendment, then the understandings that we do have at this time are understandings bearing prices that the victims of the violence and discrimination pay disproportionately. The increases in the amount of violence and discrimination are the marginal costs of increased First Amendment protection, marginal costs not borne proportionately by all those who benefit from that increased protection.

So too in a number of other areas. If one believes that constitutionally protected endorsements of sexual violence or sex discrimination have an effect on the level of sexual violence and sex discrimination,⁹² then again the price of the First Amendment is hardly being borne equally by the entire citizenry. Rather, it is disproportionately borne in this respect by those likely to be the victims of sexual violence or sex discrimination, a class that consists overwhelmingly of women.⁹³ Indeed, if one accepts the proposition that the domain of materials explicitly or implicitly endorsing sexual violence is much

90. In saying "it could be otherwise," I mean two things. First, my assumptions might be wrong. Second, even if they are right, they are still empirically and contingently right rather than logically or necessarily right, so that what is right at this time and in this place might be otherwise at other times or in other places.

91. The claim is guarded in this way in large part because many other aspects of First Amendment doctrine may have had the effect of reducing the level of racism. I am thinking here of the propositions that First Amendment rulings in the 1960s had the effect of facilitating the efforts of the civil rights movement, see, e.g., *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969) (peaceful and orderly march to press desegregation claims protected by First Amendment); *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (First and Fourteenth Amendments protect right to protest "by silent and peaceful presence" in "whites only" library); *Cox v. Louisiana*, 379 U.S. 559, 568-69, 574 (1965) (reversing conviction of 23 student participants in peaceful march near courthouse); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 282-83 (1964). See generally Harry Kalven, Jr., *The Negro and the First Amendment* (1965), which in turn facilitated a decrease in what would otherwise have been the amount of racial violence and racial discrimination. These propositions are also empirical, and thus also could be or could have been otherwise, but I doubt it.

92. As I do. See Frederick Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 Am. B. Found. Res. J. 737, 767-70.

93. This way of thinking about the costs of the First Amendment is the general message of Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987).

larger than the domain of materials explicitly or even implicitly endorsing racial violence,⁹⁴ then the First Amendment may have this particular consequence even more in the area of gender than of race.

Or consider tobacco advertising. If the cigarette companies are right in maintaining that the First Amendment bars restrictions on tobacco advertising as long as cigarettes remain a lawful product,⁹⁵ if those who would restrict advertising (and many of those who would not) are right in saying that tobacco advertising increases the number of smokers,⁹⁶ if restrictions on advertising would decrease the amount of advertising without a commensurate increase in alternative methods of promoting smoking, and if smoking bears a (probabilistically) causal relationship to the likelihood of contracting lung cancer and heart disease (including diseases contracted from passive smoke), then people are dying because of the First Amendment. Now here the issues are a bit trickier, because, passive smoke aside, there are empirical and philosophical questions of voluntariness not presented when the victim is a third party, as was the case in *Olivia N.*⁹⁷ Moreover, although there is evidence that the incidence of smoking is skewed as to race and class (and for teenagers as to gender), the existence of an identifiable victim class (other than a class defined by its smoking) is more problematic than with respect to the victims of speech advocating or endorsing racial or sexual violence. Nevertheless, it may be useful to note that, because of tobacco (and perhaps alcohol as well) advertising that might but for the First Amendment be more strictly controlled, a subclass of the population is paying more for everyone's First Amendment.

With respect to all of these examples, providing compensation in a literal sense to those who pay for everyone's First Amendment is diffi-

94. If, as I believe, this is true (consider the likelihood of hearing an endorsement or trivialization of racial violence on radio or television, compared to the likelihood of hearing an endorsement or trivialization of rape or other forcible sex on radio or television), the explanation likely lies in the proportion of the population accepting the wrongfulness of the conduct at issue.

95. Strictly as a matter of doctrine, they are probably wrong, since *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 346 (1986), makes clear (even with use of cigarettes as an example) that states may regulate the advertising of harmful but nevertheless lawful products. Whether the tobacco companies' use of First Amendment rhetoric and their alliance with organizations like the American Civil Liberties Union has helped their efforts to block legislation restricting tobacco advertising (e.g., H.R. 1493, 101st Cong., 1st Sess. (1989), H.R. 1544 101st Cong., 1st Sess. (1989), S. 776 101st Cong., 1st Sess. (1989)), however, is a more difficult question.

96. Note in this regard the Tobacco Products Control Act of 1988, R.S.C., ch. 14 (1985 & Supp. IV 1989) (Can.), whose validity under the freedom of expression provisions of the Canadian Charter of Rights and Freedoms is currently before the Supreme Court of Canada after having been found *ultra vires* in *RJR-Macdonald Inc. v. Attorney Gen. of Can.* (Que. Super. Ct. July 26, 1991).

97. *Olivia N. v. National Broadcasting Co.*, 178 Cal. Rptr. 888 (Ct. App. 1981), cert. denied sub nom. *Niemi v. National Broadcasting Co.*, 458 U.S. 1108 (1982). See J.M. Balkin, *The Rhetoric of Responsibility*, 76 Va. L. Rev. 197, 240-43 (1990).

cult, and in most instances impossible.⁹⁸ Nevertheless, there are ways

98. It would be more possible when costs can plausibly be shifted to the ultimate consumers. Consider the Indianapolis Anti-Pornography Ordinance at issue in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), aff'd without opinion, 475 U.S. 1001 (1986), a more speech-protective version of which is currently before the Massachusetts legislature. Would thinking about the First Amendment implications of that ordinance (especially the parts that allowed recovery on the basis of a showing of causation paralleling that in *Olivia N.*) be different if we assumed that the costs of any damage awards could be passed along to consumers and thus not "chill" potentially affected publishers (assuming *arguendo* that we would not want to chill them)? The creators of the Indianapolis ordinance have argued repeatedly that by creating a civil cause of action the ordinance does not constitute censorship. See Andrea Dworkin & Catharine A. MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* 58-65 (1988); Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. Rev. 793, 801-03 (1991). At first blush this claim seems at odds with the Court's conclusion in *New York Times* that there is no difference for First Amendment purposes between a criminal penalty and a civil cause of action. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 277-78 (1964); see also *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) ("Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned."). But the *New York Times* conclusion is premised on the assumption that a publisher facing monetary liability will refrain from publishing just as will a publisher facing imprisonment. Although there seems much truth in the parallel, it is less true, as I argued above, insofar as the costs of monetary liability can be passed on in a way that a jail sentence cannot. To some extent defendants in obscenity cases have been doing this for some time now, treating legal fees and occasional fines as a cost of doing business and passing those costs on to the consumer insofar as price inelasticity permits. But even if prices are elastic for the products of a given purveyor of materials, this only means that there is cross-price-elasticity among purveyors (and substitutability for consumers), and not necessarily price elasticity of total demand. If we assume that for the users of graphically sexually explicit materials there is little total price elasticity although great cross-elasticity within the category, then an increase in expected costs for all publishers would likely have a smaller effect on the general availability of the materials than is commonly supposed, although it might have the effect of producing a substantial wealth transfer from the users of such materials to those who are their victims. And even if all of the foregoing is unsound, there still might be grounds for establishing victim compensation funds specially designated for the victims of sexual violence, on the theory that those people are paying a disproportionate share of the costs of (most things as well as) the First Amendment.

The foregoing may also be relevant to the question whether there is justification for the distinction between prior restraint and subsequent punishment. Such a distinction is well-entrenched in the doctrine, see, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 730-40 (White, J., concurring) (1971) (per curiam); *Near v. Minnesota*, 283 U.S. 697, 713-21 (1931), but has been questioned by many commentators, largely because it appears that the chilling effect of a subsequent punishment may have the same preventive effect that is the basis of the special aversion to prior restraints. See, e.g., Owen M. Fiss, *The Civil Rights Injunction* 69-74 (1978) (questioning rigorous standard for prior restraint when liability rules and criminal prohibitions also have "chilling effects"); Frederick Schauer, *Free Speech: A Philosophical Enquiry* 148-52 (1982) (comparing likely outcomes of prior restraint and subsequent punishment regimes); John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 Yale L.J. 409, 426-34 (1983) (discussing whether injunctions should be constitutionally disfavored even when directed against speech not otherwise protected under First Amendment); William T. Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech*,

of compensating that are not strictly monetary. As we think about social responses to racism or sexual violence on campus, or anywhere else, or as we think about social responses to many other phenomena that are likely increased as a result of existing understandings of the First Amendment, can we consider more seriously whether compensatory responses are merely a way of recognizing that some may bear the costs of our constitutional rights more than others?

Indeed, the issue of distribution arises not only in the context of constitutionally protected communications causally related to the incidence of a social harm. It arises as well in the context of the second part of the definition of "hate speech" that I offered above, communications that are themselves harmful⁹⁹ to some involuntary perceivers, as in the case of racial epithets, the proposed Nazi march in Skokie,¹⁰⁰ sexually violent or degrading images that women cannot avoid,¹⁰¹ flag desecration,¹⁰² targeted picketing,¹⁰³ or the word "fuck" on Paul Cohen's jacket.¹⁰⁴ Especially where there is intent to injure, as when the Nazis selected Skokie rather than some other community precisely because the likelihood of injury would be greater there than in other locations, many of these cases are ones in which the intentional infliction of emotional distress would otherwise be compensable as a matter

Subsequent Punishment, and the Costs of the Prior Restraint Doctrine, 67 Cornell L. Rev. 245, 274-77 (1982) (considering relative effectiveness and social costs of injunctions and subsequent punishment); Martin H. Redish, The Proper Role of the Prior Restraint Doctrine in First Amendment Theory, 70 Va. L. Rev. 53, 59-75 (1984) (rejecting traditional justifications for prior restraint doctrine); Schauer, *supra* note 23, at 725-30 (arguing that timing of governmental regulation of speech has little to do with dangers of oversuppression). See generally Stephen R. Barnett, The Puzzle of Prior Restraint, 29 Stan. L. Rev. 539 (1977). Still, as long as it remains impossible to pass along a jail term for contempt, and insofar as it is possible to pass along the costs of a fine, then there may be a relevant difference between an injunction (enforceable by imprisonment for contempt) and a monetary fine, with the latter, as the classical prior restraint doctrine would maintain, potentially less restrictive than the former.

99. I use the word "harmful" rather than the word "offensive" because I believe that much of popular libertarian discourse about free speech uses the word "offense" to trivialize what someone else claims to be a harm. Thus, even if there is a sound distinction between harm and offense, see 2 Joel Feinberg, *Offense to Others, The Moral Limits of the Criminal Law* 1-5 (1985); Judith Jarvis Thomson, *The Realm of Rights* 354 (1990), the common use of the word "offense" is often question-begging, with "offense" being the label many people commonly apply to utterances the applier has determined, on unarticulated grounds, to be harmless.

100. See *Collin v. Smith*, 447 F. Supp. 676, 686-87, 700 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), stay denied, 436 U.S. 953, cert. denied, 439 U.S. 916 (1978).

101. See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1535-36 (M.D. Fla. 1991); see also Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 Harv. C.R.-C.L. L. Rev. 1, 39 (1985) (discussing interplay between pornography, civil rights, and First Amendment).

102. See *United States v. Eichman*, 496 U.S. 310, 318-19 (1990); *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

103. See *Frisby v. Schultz*, 487 U.S. 474, 484-88 (1988).

104. See *Cohen v. California*, 403 U.S. 15, 21-22 (1971).

of tort law, but in which the First Amendment prevents recovery.¹⁰⁵

In some of these instances, the likely targets of the speech may disproportionately be those who can least afford to bear the cost, or have to bear it more often than others.¹⁰⁶ When the incidence of the costs of the First Amendment are not, even over time, evenly distributed, the arguments for taking those costs seriously become even stronger. If we understand that some people are more likely to be the targets of racial epithets than others, if we understand that the display of images of sexual violence hurts women more often, more severely, and more immediately than it hurts men, then thinking about reactions to hate speech could quite possibly be different. First of all, we might think differently about whether to protect the speech when the costs of that protection are borne not by all citizens or randomly selected citizens (as might be the case with the public disruption occasioned by parades and demonstrations in the public forum), but rather exclusively or disproportionately by a particular group, and perhaps even more so when it is a group that is itself the subject of special constitutional attention.

But even if the speech must remain protected, keeping in mind the identities of those who pay the costs of that protection is important. All too often, those who defend the existing approach by saying "this is the price we pay for a free society" are not the ones that pay very much of the price.¹⁰⁷ Not many people would think it inappropriate to design various programs based on the realization that African-Americans are disproportionately afflicted with hypertension, that Jews disproportionately contract Tay-Sachs disease, that alcoholism has a greater statistical incidence among Native Americans and the Inuit, and that men do not contract ovarian cancer. If so, then creativity in thinking about the First Amendment, or creativity in thinking about appropriate responses (for example, official condemnation, or mobilization of social condemnation) in light of First Amendment protection, might lead to parallel reactions when we realize that not a disease but the cost of a social benefit is borne much more by some than by others.¹⁰⁸

105. In particular, see *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988).

106. See Mark Tushnet, *Political Correctness, the Law, and the Legal Academy*, 4 *Yale J.L. & Human.* 127, 149 (1992).

107. See Mary Ellen Gale, *Reimagining the First Amendment: Racist Speech and Equal Liberty*, 65 *St. John's L. Rev.* 119 (1991).

108. Mark Tushnet has pointed out to me that when we provide increased police protection for a speaker in order to prevent that speaker from being injured by a hostile audience, see *Gregory v. City of Chicago*, 394 U.S. 111, 115-16 (1969) (Black, J., concurring), the public has agreed to subsidize some of the costs of the First Amendment. There are differences here since presumably the alternative is having the costs borne by an injured speaker, but it is a good example of the fact that public assumption of the costs of constitutional rights is far from unprecedented.

VI.

A century ago Holmes declared that a central principle of the common law was the preference for letting injuries lie where they fell. But even if Holmes was right then, that generalization hardly describes contemporary American law, where compensation for injuries, usually by the agent wrongfully causing them, is far more the rule than the exception. Were we operating under the Holmesian assumption, the general unwillingness to compensate those injured by communicative acts would be but an example of a more pervasive jurisprudential approach. My goal is thus not to urge a move from a less compensatory to a more compensatory legal environment. And those who believe that we have already moved too far in that direction may find any argument for compensation a further reinforcement of what to them is already a bad idea. But that debate I leave for others or for other times. To the extent that compensation for injuries caused by others remains our baseline, and especially when a wide variety of nonphysical harms are compensated pursuant to that baseline, the exclusion of a host of harms in the name of the First Amendment represents an anomaly.¹⁰⁹ This is most apparent with respect to defamation, *Herceg*-variety cases of speech-induced physical harm, and the intentional infliction of emotional distress, for here we are dealing not with creating new grounds for liability, but with claimants who would have valid tort actions were it not for the operation of existing First Amendment doctrine.

In those areas in which the First Amendment currently precludes compensation, it may be that the disproportionate cost of an undifferentiated social benefit¹¹⁰ is just a fact of life, to be put into the "life is unfair" category along with the way in which a small group of Olympic athletes in 1980 paid a disproportionate price for an undifferentiated foreign policy initiative and in which farmers and longshoremen disproportionately shouldered the burdens of the roughly contemporaneous wheat embargo. Or we may think (although I do not) that free speech itself benefits all of us roughly equally over the long run, even though it may benefit some people or some groups more, and burden some people and some groups more, in particular cases. Or it may be (although again I doubt it) that we believe that over time the disproportionalities of all of our rights and all of our obligations even out, such

109. It is possible that underneath the application of the First Amendment is the sense that harms to reputation, emotional distress, and the like are not "real" harms, with the First Amendment serving to clear out of tort law and criminal law injuries that probably should not have been there in the first place. In this Article I take First-Amendment-free tort law as my general baseline, but I discuss (and reject) what I call the "lesser harm hypothesis" about speech-induced injuries in Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 *Ethics* (forthcoming 1993).

110. This is itself a debatable proposition. Is the First Amendment disproportionately beneficial to people with a certain class of interests? See MacKinnon, *supra* note 93, at 206-13; R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 *Am. Econ. Rev.* 384, 386-88 (1974).

that some pay more for some social goods, but benefit more from others. But even if all of these beliefs are sound, the immediate fact that the cost of a constitutional right is being borne disproportionately by victims of its exercise ought at least to occasion more thought, especially in the First Amendment area, than it has to date. The consequence of such thinking may not be to change in any respect how we now treat the costs of the First Amendment. Personally, I doubt that such an unchanged First Amendment would emerge from thinking more seriously about the incidence of its costs and the full breadth of possibilities for paying them. But even if First Amendment doctrine emerged unchanged from such rethinking, and even if the costs of the First Amendment must thus remain borne overwhelmingly by its victims, then at least we could say that there was no alternative, rather than that it was the first approach that came to mind.

5 Cardozo J. Int'l & Comp. L. 341

Cardozo Journal of International and Comparative Law
Fall 1997

Broadcasting Reform In India: A Case Study in the Use of Comparative Media Law
Chapter 1
Part I Background

HISTORY OF INDIAN BROADCASTING REFORM

Sevanti Ninan¹
Copyright (c) 1997 Yeshiva University; Sevanti Ninan

Through fifty years of existence as an independent nation, the concerns that have emerged with regard to broadcasting in India are contradictory ones. There is anxiety that state regulation of the broadcasting media may impinge upon the citizen's freedom of speech and that the Indian State may misuse broadcasting. At the same time, there is the fear that broadcasting freedom will get out of hand and destroy the country's culture and polity. The Government is anxious that it should be able to retain control in times of emergency.

If two single pieces of law can be identified that have exercised these contradictory pulls and from which most of the court cases and judgments pertaining to broadcasting have originated, it is article 19 of the Indian Constitution which guarantees freedom of speech, even as it imposes reasonable restrictions upon such freedom, and the Indian Telegraph Act of 1885 which concentrated in government all powers with regard to wireless broadcasting.

A host of subsidiary concerns have also manifested themselves, expressed through various committee reports and political pronouncements of the country's leaders. These are that broadcasting should play a role in unifying, informing, and developing the country, give voice to regional aspirations, firmly resist communal forces and culturally alien influences, as well as preserve the sovereignty of India.

Overall, therefore, the impetuses that governed broadcasting philosophy and practices over five decades are rooted in fundamental democratic principles expressed in article 19, in the restrictions placed by an archaic law governing telegraph, in the nature of underdevelopment that characterizes the country, in the sociopolitical *342 culture of a nation facing constant challenges to communal peace, and in its state of constant political tension with its neighbor, Pakistan.

In the decade of the nineties there have been changes in the external broadcasting environment. Thanks to technology, India is no longer insulated from global influences and currently receives at least thirty satellite television channels through cable, uplinked from abroad. The recognition of what such technology-led globalization implies constitutes the latest impetus to broadcasting reform. The privatization and licensing proposals in the new legislation are part of the move to legalize competition for the state media in the electronic medium. It seeks to reconcile the citizen's demand for choice with the demand from the political class for regulation, while preserving the country's cultural ethos in the face of a vast increase in foreign satellite television channels.

The Broadcasting Bill, 1997 reflects these concerns, even as it displays anxiety about political and communal influences on broadcasting. It reflects development imperatives, fears of alien cultural imperialism, and it expresses regulatory intent. It is the product of many historical strands in the evolution of Indian broadcasting reform.

The earliest laws pertaining to wireless and radio broadcasting predated the formation of the Government of independent India. The earliest significant act was the Indian Telegraph Act of 1885 which gave power to the Government to control the establishment, maintenance, and working of wireless apparatus. "Within India the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs."¹ It also conferred the power to grant licenses to others to establish, maintain, or work a telegraph. There have been five amendments to this Act between 1957 and 1974.

Section 7 of Act 47 of 1957, an amendment to the 1885 Indian Telegraph Act, expanded the term “telegraph” to “any telegraph line, appliance, or apparatus for the purpose of affording means of telegraphic communications.” The Indian Government’s current monopoly over radio and television broadcasting derives from this Act. The Ministry of Information and Broadcasting has been known to oppose the import of satellite earth stations and the uplinking to satellites by private parties under the provisions of this ^{*343} Act, thus stretching the interpretation of “telegraph” to cover the generating of signals for telecasting. To deal with the possession of wireless apparatus and radio receivers which were not part of this Act, the Indian Wireless Telegraphy Act of 1933 came into being. It made the possession of a radio set without a license an offense.

Broadcasting was initially confined to radio. The first radio service in the country was provided by the Indian Broadcasting Company which opened in 1927 and went into liquidation by March 1930, having established stations at Bombay, Calcutta, and Lahore. A month later, in April, broadcasting was placed under the direct control of the Government of India in the Department of Industries and Labor. A service designated the Indian State Broadcasting Service began broadcasting. In December 1932, the British Broadcasting Corporation (“BBC”) began a regular broadcasting service to the Empire, India’s first and longest lasting encounter with the foreign media.

In 1936, the nomenclature of the Indian State Broadcasting Service was changed to All India Radio (“AIR”), and in 1937, AIR was transferred from the Department of Labor to the Department of Communications. In 1941, it was transferred to the new Department of Information and Broadcasting which, after independence, became the Ministry of Information and Broadcasting in 1947.² Comprised as India was of princely states, the British Government decided to give the governments of provinces and the rulers of what it called “federated states” the right to construct and use transmitters and to regulate and impose fees in respect of the construction and use of transmitters and receiving apparatus in the province or state. This position was spelled out in section 129 of the Government of India Act of 1935.³ It is an interesting historical nugget because, following independence, the Government of India kept broadcasting firmly in the hands of the Central Government. In the early nineties, long after television was also established in the country, the State Government of West Bengal demanded that the second television channel that had been started by the state broadcaster Doordarshan in metropolitan cities be handed over to state governments to run. But to date, the Central Government has not conceded to this demand.

^{*344} When India gave itself a constitution in 1951, it brought into force article 19 which guaranteed the fundamental right to freedom of speech and expression, while imposing reasonable restrictions on this freedom. These restrictions were outlined in article 19(2):

Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.⁴ Over the years, a whole body of case law has evolved around this fundamental right, as it has been repeatedly invoked in relation to the print media, publication of certain kinds of books, advertisements and, more recently, television.

In 1952, Parliament passed the Cinematograph Act which created an apparatus for the censorship of films intended for public viewing. It brought into existence the Board of Film Certification. Any film intended for exhibition was required to get a certificate from this Board sanctioning it for either restricted or unrestricted public exhibition. The guiding principles in certifying films stipulated in this Act echo in their entirety the restrictions in article 19(2) of the Constitution.

A film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the interests of [the sovereignty and integrity of India,] the security of the State, friendly relations with foreign States, public order, decency or morality, or involves defamation or contempt of court or is likely to incite the commission of any offence.⁵ The phrase in brackets was inserted by an amendment to the original Act made in 1981. The Cinematograph Act has been amended seven times between 1953 and 1984.

Broadcasting reform has evolved over the years not just through laws but also through reports of committees appointed by the Government. Perhaps the first officially recorded misgivings about the way official media--which included radio and television--was being used found expression in the report of the Committee ^{*345} on Broadcasting and Information Media appointed by the Government in 1964. Known as the Chanda Committee report, it observed:

[C]onfidence in the faithfulness of government information has to be generated. Suspicion of official information has deepened in India because of an incorrect, even improper, use of media for personalised publicity and an undue accent on

achievements. It is necessary to correct this distortion, and also to pose in proper perspective the many problems that confront the country without withholding adverse facts while at the same time stating convincingly how the remedy lies in the people's hands.⁶ This was the first formal hint of the dissatisfaction beginning to be felt with the performance of the official media. The comments reflected the beginnings of censorship, propaganda, and misuse of the state media by political personalities that would gradually build up in a little over a decade into a demand for autonomy for the government media. This Committee already mentioned the setting up of autonomous corporations for radio and television as a desirable objective.

The Chanda Committee report strongly reflected the development imperatives that governed the philosophy of broadcasting in the sixties and the seventies. It blamed insufficient allocation of resources for the development of the mass media for the "inadequate information, poor motivation and insufficient participation by the masses in the country's development programme."⁷ In the spirit of article 19 of the Constitution, India has developed as a democracy with a vibrant free press. At the same time, because the basic law relating to telegraph urges government control of broadcasting, radio and television have remained government media. The founding principles for television were laid by votaries of development communication such as Vikram Sarabhai, an Indian space scientist who was believed to have substantially influenced Prime Minister Indira Gandhi regarding the development potential of television.

Vikram Sarabhai is believed to have also influenced Indira Gandhi in supporting an indigenous satellite development programme after she became Prime Minister in 1966. He proposed India's first experiment with farm television in 1967 and was the first ³⁴⁶ to champion the idea of using direct broadcast television to reach the most difficult and least developed areas of the country first, rather than the urban population.⁸ Though he died before it went into operation, he was the conceptual author of the Satellite Instructional Television Experiment ("SITE") in 1975 and 1976, which involved telecasting to 2,400 villages in six far-flung states, utilizing satellite time on an American satellite. SITE was the high point of the development phase. As a result of Sarabhai's vision, from the early eighties onward Indian television would become totally self-reliant in terms of its satellite requirements. Yet other impetuses would soon gain an upper hand in television's priorities. After being confined to Delhi since 1959, television was extended to Bombay in 1972 by setting up a transmitter there. In 1973, it was extended to both Amritsar and Srinagar. This was significant: even before major Indian cities got television it was important to reach those areas which were now being reached by Pakistan's television transmission. In both these cities people were watching PTV from across the border. Amritsar's television transmitter covered part of Punjab, which was on the Pakistan border. By 1973, India had already fought two wars with Pakistan, and it was very clear to the Government of Indira Gandhi that any Pakistani influence on India's border population was not desirable.

Srinagar television covered parts of Kashmir, also on the Pakistan border. And to make it possible for the local population in a sensitive border state to watch Indian television, the Government also put some 250 television receivers into villages in the Kashmir valley. Thus early on, the Government was learning to see state television as an instrument of national security.

With the advent in 1975 of the Emergency, this use would only accelerate. Misuse of television by Indira Gandhi during this period--which constituted democratic India's first suspension of democratic rights--led to a political demand for autonomy for the government media. Soon after the Emergency ended, the country got its first non-Congress Government which lost no time in commissioning a white paper titled White Paper on the Misuse of the Mass Media During the Emergency.

This was presented to Parliament in August 1977 and, in the same month, a working group was constituted to look into autonomy ³⁴⁷ for Akashvani and Doordarshan. Headed by former newspaper editor B.G. Verghese, it gave birth to the first specific attempt at Indian broadcasting reform, suggesting autonomy within a government framework. The committee proposed the formation of a trust which it named Akash Bharati. This was also called the National Broadcasting Trust. The Akash Bharati Bill was introduced in Parliament but lapsed after the dissolution of the Lok Sabha in 1979 when the Government fell.

This Trust was to consist of between twelve and twenty-one trustees who would be men and women of eminence and national stature, one-third of whom would retire every two years. In defining the objects and functions of the Akash Bharati Trust, the Bill said it would be the "trustee of the national interest for radio and television and shall uphold the collective right of the Indian people to freedom of speech, expression, and communication through the broadcast media."⁹ The Trust would conduct and organize public broadcasting services and would develop, extend, and improve these services in the public interest. It would advise the Central Government in respect of all matters relating to broadcasting. Under its charter,

the Trust was to provide a national broadcasting service predominantly Indian in content and character, and it was to uphold the "impartiality, integrity and autonomy of broadcasting in the country."¹⁰ At the time of formation, the capital of the Trust was to consist of the assets transferred to it, including land, buildings, installations, and equipment in accordance with the provisions of this Bill, and the amounts outstanding on the credit of the Non-Lapsable Fund and the Renewal and Reserve Fund as on the date prescribed; these were to be made over as an outright grant.

The Akash Bharati Trust envisaged the establishment of a Complaints Board which would hear complaints by any member of the public or an organization in respect of charges of unjust or unfair treatment, including unwarranted invasion of privacy and misrepresentation. It also envisaged a Licensing Board which would grant franchise licenses to any station (i.e., kendra) in the manner laid down in the Bill, but only for education and extension broadcasts. The franchise station would not broadcast news bulletins of ^{*348} its own but would relay from Akashvani and Doordarshan stations news bulletins or newscasts if technically feasible. These franchise stations would not sell time or undertake any form of commercial broadcasting. Franchises would be granted for three years subject to renewal on the satisfaction of the Licensing Board. All franchise stations would be subject to inspection by approved officers of the National Broadcast Trust.

When Indira Gandhi returned to power in 1980 her Government decided not to back this Bill because, according to the annual report for 1979 to 1980 of the Ministry of Information and Broadcasting, "such an organisation is not considered necessary to enable those mass media to discharge their basic objective of serving people who are not served by other media."¹¹ Similarly, the new Government also shot down an exercise begun during the earlier dispensation to grant autonomy to the Films Division which was part of the Ministry. A working group appointed in 1978 to grant autonomy to the Films Division was wound up, and this body still remains a part of the Central Government. Not only was autonomy not considered necessary at this point, but further direction to these media from the Government was considered necessary. The same year, 1980, the Ministry of Information and Broadcasting issued policy guidelines for the official media and placed these before both houses of Parliament. This was in July.

In November, the Government constituted an advisory committee to make recommendations from time to time regarding the restructuring of the various media organizations and to enable them to function in a more professional and efficient manner. In May 1982, the Ministry issued a document called News Policy for Broadcast Media. This was the product of the advisory committee mentioned above, headed by G. Parthasarathi. These guidelines are followed to this day. They cover news selection and presentation, political coverage, coverage of the president, prime minister, and ministers, statements and rejoinders, strikes and bandhs, riots and disturbances, sex and crime, national calamities, deaths and anniversaries, external news, subversion and insurgency, comments and opinions, speculation and rumor, and parliament coverage.

^{*349} Reflected in these guidelines are the same concerns outlined at the beginning of this chapter relating to national development and the maintenance of unity and communal peace. The Ministry's News Policy for Broadcast Media enjoins the news gathering apparatus to "make a deliberate effort to explore new areas of development and nation-building news."¹² And it stresses that "in a developing country the special function of broadcasting should be the coverage of development, its significance, achievements and problems."¹³ The harping on national integration and communal peace is expressed under the same heading--news policy. "The style and method of reporting news should reinforce the central principles on which national policies are based. These fundamental principles include territorial integrity, national integration, secularism, maintenance of public order, and upholding the dignity and prestige of Parliament, State legislatures, and the judiciary."¹⁴ Guidelines listed under specific headings enjoin the electronic media to be scrupulously careful in communal matters: "If riots are of a communal nature do not identify the communities concerned"¹⁵; "Never offend any particular community or religion"¹⁶; "Do not give any news which tends to incite subversive activities"¹⁷; and "AIR news bulletins should be on guard against encouraging secessionist activities even if promoted by a recognised political party."¹⁸ In reporting foreign affairs the electronic media was expected to toe the national line: "Our own national interest should be the principal consideration in the selection and presentation of a foreign news item."¹⁹ Later in 1982, the Government was to act again to express its constant preoccupation with the performance of state-owned radio and television. In December, it appointed a Working Group on Software for Doordarshan. Its task was to "prepare a software plan for Doordarshan taking into consideration the main objectives ^{*350} of television of assisting in the process of social and economic development in the country and to act as an effective medium for providing information, education, and entertainment."²⁰ This was an exhaustive exercise with a heavy focus on whether television was living up to its promise as a catalyst in an underdeveloped society. While concluding that it was not, the report blamed the structure and management style of Doordarshan and recommended several steps that would ensure functional autonomy. The report suggested the creation of a National Doordarshan Council

which would include members competent by virtue of their expertise and wide range of experience in the field to tender advice to the Minister on broad social objectives as well as modes of television programming.

The Working Group said that it saw three roles for the National Doordarshan Council: as a body that would review and guide the organization's performance, as a guardian of Doordarshan's functional and professional autonomy, and as a counterpart of the Press Council for examining complaints of inaccuracy or bias in the reporting of news and comment on current affairs.²¹ Essentially, this recommendation could be construed as attempting to effect some of the changes in Doordarshan's functioning that would have resulted had the Verghese Committee's recommendations been implemented. The Working Group suggested that Doordarshan be headed by a director-general who had a proven record of excellence in any area of social communication as well as the leadership qualities necessary for attracting and utilizing creative talent in the service of the country's people through Doordarshan. It suggested that his status, emoluments, and financial powers should not be less than that of a secretary to government. At this point, the Working Group added an interesting sentence: "The person should be of such acknowledged professional eminence that no question of worry about career prospects should arise in the event of his having to resign if the functional and professional autonomy of Doordarshan is interfered with."²² It also recommended strongly that the salary, promotional avenues, and support for all Doordarshan staff responsible for the ³⁵¹ quality of software should be reviewed and improved at the earliest moment. The recommendations of this Working Group were never really implemented.

Following Indira Gandhi's assassination towards the end of 1984, the government media delayed announcing her death, which the country learned of from the BBC. It symbolized AIR's and Doordarshan's lack of professional independence. Her son Rajiv Gandhi became Prime Minister immediately after her death, and in the general elections which followed shortly after, he led the Congress Party back to power with a comfortable majority.

In the first couple of years of his tenure, Rajiv Gandhi attempted a brave opening up of television, of making television news independent, but as dissidence grew within his party and his own political problems grew, he abandoned these efforts. In 1989, with the next general election due at the end of the year, attempts to misuse radio and television to build up Gandhi's image and tarnish his political opponents led the political opposition to make autonomy of the official broadcast media an election issue.

Meanwhile, in the same year, 1989, the Delhi High Court ruled that the fundamental right to freedom of speech on Doordarshan could only be curtailed by a valid law, not by a departmental rule or instruction. It ordered the organization to broadcast a film which it had refused to earlier on the ground that it was too critical of the Government. This case, *Cinemart Foundation v. Union of India*,²³ centered on a film on the Bhopal gas tragedy called "Beyond Genocide" which won a national award, but which Doordarshan declined to telecast, though a government stipulation required that all national award winning films be televised. Following the High Court ruling the Government appealed to the Supreme Court, which rejected the appeal and observed that Doordarshan being a state-controlled agency funded by public funds could not deny to the respondent access to the screen except on valid grounds. After five years of rule, the Congress Government under Rajiv Gandhi was defeated in a general election in 1989. The non-Congress minority Government which came to power decided to keep its campaign promise of autonomy for the official media. Akash Bharati was dredged up and reexamined. What was introduced in Parliament was a bill called *Prasar Bharati*. It differed in ³⁵² significant ways from the earlier exercise undertaken by the Verghese Committee.

A comparison between the salient features of the Akash Bharati Bill of 1978 and the *Prasar Bharati* Bill of 1989 shows how thinking on the subject of autonomy for the government media had evolved in those eleven years.²⁴ The first was envisaged as a trust, the second as a corporation. Akash Bharati provided for trustees, *Prasar Bharati* for a board of governors. The first did not envisage any representative of the Union Ministry of Information and Broadcasting on the Trust, the second provides for such a person. The earlier structure talked of granting broadcast franchise licenses to stations or kendras through its Licensing Board, the subsequent one neither provided for granting franchises nor for the constitution of a licensing board. The charter of the Trust and the objective of the Corporation were very similar, but there were three conspicuous omissions in the latter. The draft *Prasar Bharati* Bill dropped the clause promising to "uphold the fundamental right to freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution."²⁵ It also dropped the clause pledging to "uphold the impartiality, integrity, and autonomy of broadcasting in the country."²⁶ In addition, Akash Bharati spells out the Trust's relations with the Government while *Prasar Bharati* says nothing on the subject. Both drafts, however, talk of upholding the unity and integrity of the country and spell out their commitment to deploying broadcasting to serve the education and development needs of the underprivileged. Financial provisions in both were also broadly similar. Additionally, the two drafts provided for a body to receive complaints. Akash Bharati called this the Complaints Board,

Prasar Bharati called it the Broadcasting Council. The first provided for a chairman and two members, the second for a president and ten part-time members. Prasar Bharati allowed for the constitution of regional councils if so required.

The Bill that was finally passed in 1990 was different in some important respects from the draft Bill introduced in 1989. The most significant difference was the incorporation of a parliamentary committee to oversee the functioning of the Corporation and submit *353 a report on its working to Parliament. This was a 22-member committee, fifteen of whom would be from the Lok Sabha and seven from the Rajya Sabha. It was widely perceived as being a measure that would dilute the autonomy given to the government media.

In his reply to the debate on the Bill from August 29 to 30, 1990, the Minister of Information and Broadcasting and Parliamentary Affairs, P. Upendra, gave the rationale for introducing this committee into the draft of the Prasar Bharati Bill. He said this was done because "if this is not provided, the Corporation would have come under the purview of the Public Undertakings Committee or some other Committee. But while providing a special committee to oversee its functioning, we have given a special status to this Corporation and we have attached a lot of importance to it."²⁷

Other changes made in the Bill that was finally passed from the 1989 draft were the change in nomenclature from governors to members, the conversion of the chairman from whole time to part time, the addition of two representatives of employees on the Board of the Corporation, and the inclusion of four members of Parliament on the Broadcasting Council. The final version of the Bill also included a colorful little clause describing the grounds on which the chairman or any whole-time member of the Board could be removed: "if such. . . is convicted of any offence involving moral turpitude."²⁸ Overall, the quality of autonomy finally conferred legislatively on the electronic media in 1990 was diluted in spirit compared to what had been conceived of in 1978. Parliament passed this Bill, but the Government fell before it could be notified. The caretaker Government that came in shelved the question of autonomy. This Act then went into cold storage for another seven years until yet another non-Congress coalition Government decided to notify it in 1997.

When elections were called again in 1991, the Congress Party declared in its manifesto that it would free the electronic media if it came to power. In its five-year term up to 1996, it never delivered on this promise.

*354 The Congress Party was elected as a minority government, and that year the satellite invasion began in the aftermath of the Gulf War. Hotels showed CNN coverage of the war, and private entrepreneurs quickly sprang up in housing collectives offering cable connections linked to a roof-top dish antenna. Though the advent of cable as a phenomenon began only after the Gulf War, the Government had already appointed a committee in June 1989 to study the various aspects of the establishment of Cable Television Networks and Dish Antennae Systems in the country. It submitted its report in February 1991. Its findings on the extent and nature of cable networks in the country laid the foundation for efforts to regulate cable.

In May 1991, the Hong Kong-based STAR TV began beaming channels into India via the ASIASAT-1 satellite with its South Asian footprint. Just a few months later, the Government appointed a committee to take a quick look at introducing competition in the electronic media. It made some guarded recommendations in this regard by October 1991. This was the first indication that the Government was registering the advent of competition and looking beyond just the issue of autonomy for the state-owned media to the eventuality of private sector competition for the government channels. This was quickly followed up in December by the appointment of another committee, whose charter was to look at Doordarshan's commercial services.

Its report acknowledged that competition from the new foreign satellite channels was resulting in an erosion of Doordarshan's viewership and, consequently, commercial revenues. It suggested revamping Doordarshan's programming content as well as its program scheduling patterns, more aggressive wooing of advertisers by state television which so far had a complete monopoly on all advertising, reviewing Doordarshan's advertising code to make it more liberal, and rationalizing its advertising rates.

In September 1992, yet another committee was appointed, this time to look at the best way to open up the electronic media to private broadcasters. Called the Air Time Committee of India, it was supposed to work out the modalities of giving broadcasters licenses to broadcast on the second channel of Doordarshan that had been started in the metropolitan cities, as well as on FM radio channels. Again, this move towards privatization represented a significant change in policy: private producers would produce programs for Doordarshan, but they had never before been given time *355 on the channels to manage and use without any program preview. The Committee came up with a lot of idealistic and radical recommendations. Like many committee reports before it, this one too was never implemented.

In October 1992, Zee TV, a satellite Hindi channel, began telecasting to India and policy makers in the Indian Government sensed that competition for Doordarshan's National Network would intensify. By January 1993, on Republic Day, the Government launched its first entertainment channel called the Metro channel, initially only in the big metropolitan cities. The four metro channels that already existed were linked up with common entertainment programming. It began rather poorly but eventually was to counter successfully the threat of Zee TV.

Meanwhile, with the demolition of the Babri Masjid in December 1992, Doordarshan once again retreated into news censorship, even as BBC and CNN lost no time in telecasting the news, first with file pictures and later with updates from the scene. It showed that competition had not changed Doordarshan's innate instincts as a timid state broadcaster.

After three decades of unimplemented good intentions, 1995, 1996 and 1997 have seen rapid developments in the field of Indian broadcasting reform. With cable-delivered foreign satellite channels making steady inroads into both people's homes and their imaginations, the Government suddenly moved in September 1994 to promulgate an ordinance regulating cable television. It sought to register all cable operators and to enforce a program code for programs transmitted or retransmitted by cable operators. The Government introduced a must-carry stipulation enjoining all cable operators to transmit at least two Doordarshan channels.

The following year a cable law with the same provisions was introduced and passed. It was to be enforced all over the country by local authorities, but it never was implemented.

In February 1995, the Supreme Court delivered a landmark judgment in *Ministry of Information and Broadcasting v. Cricket Ass'n of Bengal*, which involved the rights of a cricket association to give telecast rights to an agency of its choice.²⁹ The Court ruled that airwaves constitute public property which must be utilized for advancing public good. In two separate concurring judgments, the Court said the right of free speech guaranteed by article 19(1)(a) *356 did not include the right to use airwaves which were public property. Being public property, it was the duty of the state to see that airwaves were so utilized as to advance the free speech right of the citizens which was served by ensuring plurality and diversity of views, opinions, and ideas. This could not be ensured by a medium controlled by a monopoly, whether the monopoly was of the state or of any other individual, group, or organization. The Court ruled that "[t]he broadcasting media should be under the control of the public as distinct from Government. This is the command implicit in Article 19(1)(a). It should be operated by a public statutory corporation or corporations. . . ."³⁰ Throughout this judgment, while referring to limitations on the right to have access to telecasting, the judges referred to the restrictions imposed on free speech by article 19(2), not the 1885 Telegraph Act. About this Act it observed: "The Indian Telegraph Act, 1885 is totally inadequate to govern an important medium like the radio and television, i.e., broadcasting media. The Act was intended for an altogether different purpose when it was enacted."³¹ The Supreme Court's rejection of the notion that the state could have a monopoly on the use of airwaves suddenly changed the level of debate on broadcasting reform in India which had largely been confined to the need for autonomy of the state media. Existing statutory restrictions on public access to broadcasting that were not rooted in article(19)(2) were rejected by this judgment. The judges argued that a limitation was imposed by the nature of public property involved, namely, airwaves or frequencies. "[W]avelengths for broadcasting were limited [[[,]"³² it declared. This was a quaint observation in an otherwise forward-looking judgment. It ignored completely the existence of cable-delivered satellite television, particularly digitally compressed television signals which did not suffer from any limitation on the number of channels that could be delivered. Following this judgment which ordered the Central Government to "take immediate steps to establish an autonomous public authority. . . to control and regulate the use of the airwaves[.]"³³ the Ministry of Information and Broadcasting set about drafting broadcasting legislation that would establish a broadcast authority *357 and open up the airwaves to private parties, individuals, and public bodies wishing to enter the field of broadcasting and telecasting. The Congress Government which was in power at this point had still not lived up to its election-time party manifesto promise of implementing *Prasar Bharati*, some four years after it had been in power. Amendments to this Act were still being drafted. In the same year, court cases were filed alleging the corrupting influences of satellite television on the citizenry, and in response to one such petition a metropolitan magistrate ordered the Government to monitor all satellite broadcasts for culturally alien values and morally offensive depictions. The results of this monitoring showed some of the private, regional satellite channels in the south to be the biggest offenders. Another court appeal by a nurses association resulted in Zee TV being ordered to change the rather salacious depiction of nurses in a feature film that it had telecast on its movie channel.

In 1996, another metropolitan magistrate declared in an order that television needed to be actively censored because it was ruining the country's moral fabric. Suddenly, the urge to regulate foreign television channels was renewed. His rather

colorful order argued that foreign channels operating in India and promoting “the opposite of Indian culture”³⁴ had led to Doordarshan competing with such channels on commercial lines, “thereby bringing cultural invasion into the lives of millions of Indians.”³⁵ He declared that “the freedom of speech and expression cannot be permitted to be diluted to stifle expression nor licentiously enlarged to promote a riot of sensual display.”³⁶ The magistrate ruled that both Doordarshan and the private channels would have to obtain clearance from the Censor Board for every film, serial, or commercially sponsored advertisement that they aired. And in the event of non-compliance of directions, police officers of the concerned police station not below the rank of sub-inspector would have the right to enter any place or studio from which the film or serial was being exhibited or likely to be exhibited, search and seize the offending material, and initiate legal proceedings under the relevant laws.

***358** By a 1984 notification issued by the Central Government, Doordarshan had been exempted from provisions of the Cinematograph Act on the ground that its officials would keep the film certification guidelines in mind while clearing programs for telecast. Both the metropolitan magistrates who ruled on the issue in 1995 and 1996 strongly expressed the view that Doordarshan officials had not adequately lived up to this responsibility.

The later ruling also observed that “the Government will have to initiate a clear policy to stop cultural invasion by technological and scientific means and by such other means as may be feasible.”³⁷ Thus, pressure was building up from the judiciary for regulation and reform. In the same month, a high power committee that had been appointed in 1995 to rethink completely the role, organization, and functions of Prasar Bharati gave its report. Passed in 1990, before the advent of foreign satellite channels, the Prasar Bharati Act was assumed to be fairly obsolete, even by the Ministry of Information and Broadcasting. This committee, known as the Sengupta Committee, recommended that a provision be added to the Prasar Bharati Act providing for the creation of an Independent Radio and Television Authority of India to grant licenses to satellite channels, domestic or foreign, and permit them to uplink from Indian soil. It recommended that licenses be given subject to the payment of the required application fee, an annual license fee, and adherence to standard codes on broadcasting and advertising.

The Committee observed that ensuring plurality alone was not an adequate safeguard and that it would be necessary to prescribe programming obligations and programming standards for the private operators to ensure quality and diversity.

It also turned its attention to the question of Doordarshan’s monopoly in terrestrial broadcasting and recommended that this should end. Local terrestrial and radio stations should be permitted, particularly since these had competed very successfully with satellite channels in other countries.

On Prasar Bharati’s structure, the Committee recommended that the parliamentary committee of twenty-two members be dispensed with, that the part-time chairman be a full-time chairman, that there was no need for a separate chief executive, and that the provision for two elected representatives of the employees of the ***359** Corporation on the Board be dropped as it was fraught with serious complications. It said public service broadcasting ought to be structurally embedded in Prasar Bharati and that the Central Government should fully fund by way of a grant-in-aid or equity or loan the cost of running the public service broadcasting channels. Its recommendations have not been accepted so far, though they may find a place in the amendments to the Prasar Bharati Act.

Meanwhile, in March 1996 a parliamentary committee had produced a draft media policy document. India’s Parliament has consistently had a major voice in the public debate on media issues. A subcommittee of the Consultative Committee of the Ministry of Information and Broadcasting produced a working paper which so far has not been formally adopted as the country’s media policy.

The objectives of media policy, according to this subcommittee, were the following: not to permit growth of monopoly in any media; to project the developmental needs and social, cultural, and economic aspirations of the people, particularly in the rural areas which constitute the bulk of the population; to strengthen, preserve, and promote democratic traditions, culture and values, national integration, and scientific temper; and to promote and strengthen a sense of national integrity built on secularism, sociocultural pluralism, and linguistic diversities.

Other goals were also to facilitate greater access to information, education, and entertainment--in that order--to all sections of the people; to enable development in the wake of challenges thrown up by rapid technology; to provide wider choice to people in matters of information and entertainment; to act as catalysts for social change; and to ensure broadly that

discrimination based on gender, religion, caste, and language is not directly or indirectly practiced or promoted and that portrayal of any section of the society is not done in a derogatory manner.

The only sentiments in the above which have not been repeatedly asserted by laws and committee reports over the years were those which expressed the resolve not to permit growth of monopoly in any media and to enable development in the wake of challenges thrown up by rapid changes in technology.

On the specific subject of broadcasting, the subcommittee recommended setting up a regulatory body as an autonomous authority to oversee both public and private telecasting and broadcasting. The authority would also need to regulate transmission frequencies. The subcommittee stressed that no recourse should be taken *360 by the Government to dilute the provisions of the Prasar Bharati Act, and it added that there was a need to bring foreign satellite channels within the ambit of such a regulatory body. It also suggested the creation of a mechanism redressing public grievances.

It felt adequate care should be taken to enable the setting up of non-commercial broadcasting stations to be run by universities, educational institutions, panchayats, local bodies, state governments, etc. It also suggested that the Government devise an institutional system for funding public broadcasting.

The subcommittee took the stand that the Indian private sector, state government, NGOs, and local government should all be allowed to enter the field of broadcasting and telecasting. It expressed itself in favor of cross-media ownership restrictions. It took the unambiguous stand that direct or indirect foreign equity participation in companies entering the field of private broadcasting should not be permitted.

Work on a comprehensive broadcasting bill had begun in 1995 shortly after the Supreme Court judgment on airwaves. There was no visible hurry until the last quarter of 1996 when the Government was suddenly galvanized into action by STAR TV's plan to be the first in India with direct-to-home ("DTH") broadcasting. Though so far there had been no stated policy statement on DTH, not even in the media policy working paper, the Government suddenly issued an ordinance in December effectively banning the use of Ku Band antennae in certain frequencies without licenses.

In the same month, the Ministry of Information and Broadcasting drafted a note for the Union Cabinet which detailed the basic principles on which a comprehensive broadcast law for the country was to be based and outlined provisions of the bill being proposed. It said at the outset that having a broadcast law had become urgent in view of the impending start of the "much more powerful digital Direct to Home. . . services."³⁸ In January 1997, the Cabinet Secretary called a meeting of the Committee of Secretaries to discuss this draft, with the country's top officials from Space, Telecommunications, Home, Information and Broadcasting, and the intelligence services all present. In May 1997, the Broadcast Bill was finally introduced in Parliament. Different segments of it are derived from the different *361 impetuses for reform mentioned at the outset of this chapter and are rooted in the constitutional clauses, committee reports, judgments, and policy statements that have since 1950 shaped the State's approach to broadcasting.

Thus, the cultural concerns expressed--the portrayal of violence and sexual conduct, the need to lay down standards of taste and decency, to promote values of national integration, religious harmony, scientific temper and Indian culture, and to ensure time for children's programming, educational programming, developmental programming, and programming of Indian origin--are mentioned in the Cinematograph Act, Akash Bharati and its successive mutations, in the Working Group's report on software for Doordarshan, and then in the nineties become an increasingly shrill concern in committee reports and court judgments.

Several security, communal, and national integrity concerns reflected in the Bill, particularly in the conditions for giving or cancelling licenses, are actually echoing concerns that hark back to article 19(2), which are also reflected in the Cinematograph Act, Akash Bharati, the News Policy for Broadcast Media published in 1982, Prasar Bharati, and so on. These are concerns that broadcasting should not incite crime, lead to disorder, or be offensive to public feeling; they are concerns that broadcasting should give accurate and impartial news and should display impartiality in respect of social or political issues or in matters relating to public policy. These concerns expressed in the Bill also relate to the portrayal of violence, guarding against improper exploitation of religious susceptibilities, and offense to religious views and beliefs of those belonging to a particular religion or religious denomination. In addition, these concerns are reflected in the emergency powers given to the Central Government to stop any broadcasting service considered prejudicial to friendly relations with foreign countries, public order, security of state, or communal harmony.

The stipulation that foreigners and foreign companies cannot be given licenses and that foreign equity should be restricted to forty-nine percent derives partly from the draft media policy of 1996 and partly from a recurring debate in Parliament and outside on the desirability of allowing unrestricted access to foreign channels. In 1996, as mentioned above, a metropolitan magistrate asked the Government to find the technological means to stop what he called the cultural invasion.

***362** Essentially, the communal concerns expressed in the Bill reflect the political upheavals in the country beginning in the early eighties, the Hindu-Sikh clashes, communalization of electoral politics, and, in the nineties, the threats to communal harmony following the demolition of Babri Masjid at Ayodhya. Both the political and communal concerns reflect the continuing tensions in India's relationship with Pakistan, seen in Punjab, in the decade of the eighties, and in Kashmir in the nineties.

The development imperatives in the Broadcast Bill are traceable back to the Chanda Committee report and have since found expression in every piece of draft legislation, in the 1983 Working Group report, and in much else.

The regulatory imperatives which form the cutting edge of the proposed legislation originate, to some extent, in the Cable Television Networks (Regulation) Act, the Supreme Court judgment of 1995, the draft media policy, the Sengupta Committee's observations in the report of the high power committee on Prasar Bharati, and, in no small measure, in actual developments in the field of broadcasting in the last quarter of 1996, namely, the intentions of the Rupert Murdoch-owned company, News Television India, to start DTH operations in India.

Following its introduction, the Broadcast Bill was referred to a Joint Select Committee of Parliament which was supposed to study its implications and give recommendations. This was an all-party committee.

In July 1997, the Ministry of Communications issued a notification prohibiting the use of broadcast apparatus for the transmitting or receiving of signals in frequency bands above 4800 MHz. In its explanatory memorandum, it said that the new technology called DTH "would enable any broadcaster within or outside India to telecast or beam any programme of his choice directly to the houses and bedrooms of the general public."³⁹ It added: "Therefore it has become necessary to ensure that no person should be allowed to start such a DTH service in India by establishing, maintaining, working, possessing or dealing in any equipment that enables reception and dissemination of programmes from a DTH service in India."⁴⁰ ***363** Murdoch's DTH operation, already languishing in a state of readiness since April, then decided to go to court to appeal against the Government's ban, invoking the freedom of speech guaranteed in article 19(1)(a) of the Constitution.

Around the same time, in July 1997, the Government suddenly decided to notify Prasar Bharati, which had been languishing since August 1990 without the notification which would bring the law into force. In doing so, it abandoned exercises in amending the Act or restructuring the Corporation. The reason for the sudden revival of interest in Prasar Bharati was a change of guard in the United Front Government, resulting in a new Prime Minister and a new Information Minister. The latter came in declaring his commitment to make autonomy for the state-owned electronic media a reality.

On September 15, 1997, the notification came into force, finally bringing Prasar Bharati into existence. It was still hamstrung by all the clauses diluting genuine autonomy, and its birth was therefore greeted with some scepticism. However, on October 29, the Government amended this notified Act through an ordinance. The amendments were made with the declared intent of augmenting the autonomy conferred by the Prasar Bharati Act on Akashvani and Doordarshan.

Section 13 of the Act, which provided for the controversial parliamentary committee to oversee the functioning of Prasar Bharati, was dropped. This clause was seen as a major impediment to the autonomous functioning of the Corporation. A high-powered committee appointed to review in totality the Prasar Bharati Act had, in 1996, recommended that this committee be scrapped.

Another amendment was incorporated in section 16 of the Act to transfer the assets of Akashvani and Doordarshan on perpetual lease on a token fee of Rs. 1 per annum instead of treating its assets as capital provided by the Government to Prasar Bharati. Other amendments took away the power of the Government to determine the maximum limit of broadcasting time available for advertisements, as well as the power to fix fees and other service charges. The number of government officials on the Board was reduced to one.

The Broadcasting Council was abolished. This was done because it was seen as duplicating a similar avenue for consumer complaints and redress provided for in the Broadcasting Bill. The Council was to have been appointed directly by the

Government *364 and was to have had four members of Parliament on its board, and, for that reason, was not seen as a sufficiently autonomous body.

Other amendments were made to remove the possibility of a foreign national becoming a part-time member of the Board and to empower Parliament, rather than the president, to make the final decision regarding supersession of the Prasar Bharati Board. All members of the Board were to be given six years tenure, and they would not be eligible for a second term.

The ordinance served to enhance significantly the statutory autonomy granted to Prasar Bharati. However, the amendments required ratification by Parliament to become law.

When Parliament met in November 1997, it was widely expected that the Joint Select Committee of Parliament constituted to make recommendations regarding the Broadcasting Bill would present these to Parliament, and a discussion on the Bill would be taken up. However, the session was short-lived: rapid political developments led to the Lok Sabha being dissolved on the recommendation of the United Front Government, and fresh elections were announced.

Imminent broadcasting regulation receded as a possibility: the dissolution of the House ensured that the Bill lapsed and would have to be introduced again by a new government at a future date. The ratification of the Prasar Bharati amendments also receded as an eventuality, though the Government prepared to reissue the ordinance to enable the new Prasar Bharati Board to continue functioning until the formation of a new government.

Footnotes

- a1 Sevanti Ninan is the media columnist for the Hindu and specializes in writing on media issues. She has authored *Through the Magic Window: Television and Change in India* (1995) and has co-edited *Beyond Those Headlines: Insiders on the Indian Press* (1996).
- 1 Indian Telegraph Act of 1885, pt. II, § 4.
- 2 See P.C. Chatterji, *Broadcasting in India* 44 (1991).
- 3 See *id.* at 42.
- 4 India Const. art. 19(2).
- 5 Cinematograph Act of 1952, pt. II, § 5B.
- 6 7 Virendra Kumar, *Comm. on Broad. and Info. Media, Committees and Commissions in India 1947-1973*, at 25 (1978).
- 7 *Id.*
- 8 See, e.g., Sevanti Ninan, *Through the Magic Window: Television and Change in India* 21 (1995).
- 9 *Autonomy for the Electronic Media: A National Debate on the Prasar Bharati Bill 1989*, at 106-07 (T.K. Thomas ed., 1990) [hereinafter *Autonomy*].
- 10 *Id.* at 108.

- 11 Ministry of Info. and Broad., Gov't of India, Annual Report 1979-80, at 1 (1980).
- 12 Advisory Comm. on Official Media, Ministry of Info. and Broad., News Policy for Broadcast Media: Guidelines Prepared by the Advisory Committee on Official Media 3 (1982).
- 13 Id.
- 14 Id.
- 15 Id. at 12.
- 16 Id.
- 17 Id.
- 18 Id.
- 19 Id. at 14.
- 20 1 The Working Group on Software for Doordarshan, Ministry of Info. and Broad., An Indian Personality for Television 217 (1985).
- 21 See 2 id. at 56.
- 22 Id. at 57.
- 23 [Cinemart Foundation v. Union of India](#), Judgments Today 1992 S.C. 204.
- 24 See Autonomy, *supra* note 9, at 105-21.
- 25 Akash Bharati Bill, 1978, § 5(b).
- 26 Id. § 5(d).
- 27 Directorate of Adver. And Visual Publicity, Gov't of India, Prasar Bharati: Consensus on a Historic Bill 12 (1990).
- 28 Prasar Bharati (Broadcasting Corporation of India) Act, 1990, No. 25, § 7(3)(d).
- 29 Secretary, Ministry of Info. & Broad. v. Cricket Ass'n of Bengal (1995) 2 S.C.C. 161.

30 Id. at 300 (Reddy, J., concurring).

31 Id.

32 Id. at 208.

33 Id. at 252.

34 Vinodanand Jha v. State, para. 23 (Delhi Magis. Ct. July 3, 1996) (unpublished interim order).

35 Id.

36 Id. para 9.

37 Id. para 45.

38 Ministry of Info. and Broad., Subject: Broadcasting Law for India 1 (1997).

39 Ministry of Communications Notification (1997), reprinted in Gazette of India Extraordinary, July 16, 1997, at 4.

40 Id.

End of Document

© 2011 Thomson Reuters. No claim to original U.S. Government Works.

43 Vand. J. Transnat'l L. 255

Vanderbilt Journal of Transnational Law
March, 2010

Articles

THE RESPONSIBILITY TO PROTECT AND THE DECLINE OF SOVEREIGNTY: FREE SPEECH
PROTECTION UNDER INTERNATIONAL LAW

William Magnuson^{al}

Copyright (c) 2009-2010 Vanderbilt University Law School; William Magnuson

Abstract

State sovereignty has long held a revered post in international law, but it received a blow in the aftermath of World War II, when the world realized the full extent of atrocities perpetrated by the Nazis on their own citizens. In the postwar period, the idea that individuals possessed rights independent of their own states gained a foothold in world discussions, and a proliferation of human rights treaties guaranteeing fundamental rights followed. These rights were, for the most part, unenforceable, though, and in the 1990s, a number of humanitarian catastrophes (in Kosovo, Rwanda, and Somalia) galvanized the international community to develop a doctrine to protect the fundamental rights of all individuals. The resulting “responsibility to protect” individuals from genocide, ethnic cleansing, and crimes against humanity stood as a radical rejection of the prewar concept of state sovereignty and assured that states could no longer hide behind the shield of territorial integrity. But the doctrine created another disconnect in international law: it picked out only a few fundamental rights for protection, leaving citizens to rely on the *256 whim of their states to protect their other rights. This Article argues that this state of the law is no longer sustainable, as it is still beholden in important ways to the now-eroded concept of state sovereignty. The responsibility to protect should be expanded to include protection of fundamental rights in general and the freedom of speech in particular. The inclusion of the freedom of expression in the pantheon of protected rights is broadly consistent with the moral, legal, and consequentialist arguments in favor of the international norm of responsibility to protect. Moreover, an expansive reading of the obligation to intervene, particularly in nontraditional ways, will increase the legitimacy of the international system.

Table of Contents

I. Introduction	257
II. The Development of a Responsibility to Protect	260
A. From National Sovereignty to Human Rights	260
B. Evolution of the Responsibility to Protect	267
C. Free Speech and the Responsibility to Protect	275
III. The Freedom of Speech in International Law	276
A. Historical Origins	276
B. International Instruments Concerning Free Speech	278
1. The Universal Declaration of Human Rights	278
2. The International Covenant on Civil and Political Rights	279
3. Convention for the Protection of Human Rights and Fundamental Freedoms	280
4. American Convention on Human Rights	282
5. African Charter on Human and Peoples' Rights	283
C. The International Law on Free Speech as Expressed by International Treaties	285
IV. The Responsibility to Protect, Sovereignty, and Free Speech	287
V. Rationales for the Responsibility to Protect	292
A. Moral Arguments for the Responsibility to Protect	293

B. Legal Arguments for the Responsibility to Protect	296
C. Consequentialist Arguments for a Responsibility to Protect	300
VI. The Case for a Responsibility to Protect the Freedom of Speech	302
A. Moral Arguments	303
B. Legal Arguments	304
C. Consequential Arguments	305
VII. Criticisms	307
A. Enforcement of the Responsibility to Protect Free Speech	307
B. The Responsibility to Protect as a Pretext for War	310
VIII. Conclusion	312

*257 I. Introduction

International law has long recognized the state as the primary--even sole--actor in international affairs, reserving to countries a number of powerful prerogatives such as the right to territorial integrity.¹ This important principle of international law, however, began to erode after the end of the Second World War, when the atrocities perpetrated by the Nazi regime upon its own citizens shocked the conscience of the entire world.² For the first time, the idea that international law should protect the rights of individuals started to gain traction in legal circles, leading to a proliferation of international human rights treaties in the postwar era.³ These treaties guaranteed a widening array of fundamental human rights: life, liberty, freedom from torture, freedom of speech, and many others.⁴ But this development led to a contradiction in the international legal regime: suddenly, individual rights ascended to the level of international law, but the long-held principles of inviolable state sovereignty remained. Treaties promised certain *258 rights to individuals, but at the same time, states were granted sole control over their internal matters.⁵ There was little or no way to enforce the provisions of the human rights treaties on recalcitrant states. All this changed in the 1990s after a series of humanitarian disasters in far-flung parts of the world such as Kosovo, Rwanda, and Somalia. The world community recognized that there existed a moral duty to intervene to prevent the massacre of minority populations in these countries, but the contemporary legal framework forbade any intervention in the "internal" matters of states.⁶ As long as states persecuted only their own citizens, there was little that other states could do legally to stop the violence. In some cases, such as Kosovo, the international community did intervene, leading to fierce debates about the legality of bombing campaigns.⁷ These debates created pressure on the United Nations (UN) and the world's powers to establish a new legal norm--one allowing for humanitarian intervention in certain limited situations. This pressure, in turn, led to the formation of the doctrine of a responsibility to protect.⁸ The rule held that individual states have a responsibility to protect their citizens from genocide, ethnic cleansing, or other large-scale loss of life, and if a country were unable or unwilling to do so, the responsibility would fall upon the broader community of states.⁹ The use of military force to protect citizens from such catastrophic harms would be permitted.¹⁰

That is where the norm stands today. But the establishment of a responsibility to protect under international law has led to yet another contradiction. The fundamental problem with the pre-World War II legal regime was that it acknowledged state sovereignty as inviolable, leaving individual citizens at the whim of their governments.¹¹ The concept of international law's peculiar nation-to-nation character--giving the state the principal role in global *259 relations--was crucial to the pre-World War II era.¹² This logic, however, became unsustainable after World War II when the extent of Nazi atrocities became known.¹³ It was this development that paved the way for the creation of the responsibility to protect doctrine. And yet, that same pre-World War II logic prevails in international law's treatment of other fundamental rights such as the freedom of speech.¹⁴ So the freedom of speech, although guaranteed by a number of important international treaties, is still considered an internal matter.¹⁵ The international community has no responsibility to protect the freedom of expression, and indeed, states may invoke the principle of nonintervention when confronted with criticisms of the suppression of speech inside their borders.¹⁶ Under the current understanding of the international law of free speech then, the state has exclusive control over its territory and people, a position darkly reminiscent of the pre-World War II era.

But a world that demands respect for human rights cannot coexist with a world that demands absolute respect for state sovereignty. The dominant theory of the post-World War II era is that the nonintervention principle is legitimately subject to certain exceptions because states have obligations to their citizens.¹⁷ What is not adequately understood today, but what is undeniably valid, is that this logic applies equally to both interventions to protect populations from widespread violations of their right to free expression and interventions to protect populations from genocide. Here, as elsewhere, human rights treaties have guaranteed to all individuals certain rights--rights that now form part of the nucleus of international law. The respect for state sovereignty cannot trump these rights any more in the area of free speech than in the area of genocide.

This is not to argue that violations of free speech rights should warrant military invasion. Indeed, such a proposition might even weaken, rather than strengthen, the legitimacy of the international system. Instead, nontraditional forms of intervention would, in most cases, provide a more acceptable form of protecting the freedom of speech from infringement. The proactive use of technologies--such as *260 the internet, radio, and television--is just one example of potential forms of intervention.

This Article explores these assertions about the proper role of international law in the protection of the freedom of expression. Part II provides a brief history of the development of the doctrine of a responsibility to protect from the end of the Second World War to today. Part III examines the relevant documents elaborating what exactly the freedom of speech protects in international law. Part IV describes the interaction between sovereignty and free speech. Part V briefly surveys the major arguments (moral, legal, and consequential) in favor of the current responsibility to protect rule, and Part VI applies these arguments to a more expansive view of the responsibility to protect that includes protection of free speech. Part VII addresses potential criticisms of this argument, particularly those relating to its practicality and the use of humanitarian intervention as a pretext for war.

II. The Development of a Responsibility to Protect

A. From National Sovereignty to Human Rights

The development of the concept of a responsibility to protect came as a logical outgrowth of a larger trend in international legal doctrine under which individuals increasingly became a subject of and an actor in international law. For hundreds of years, states acted as the sole participants in international law: only states created international law and only they were subject to it.¹⁸ But this long-heralded principle of international law began to erode in the period after World War II, as both the atrocities of that period and political exigencies put pressure on states to bring individual rights under the wing of international protection.¹⁹ After a series of international catastrophes and humanitarian interventions in the 1990s and 2000s,²⁰ the responsibility to protect norm gradually gained *261 widespread consensus and today stands as an important--even if controversial--pillar of international law.²¹

As the Earl of Birkenhead put it in 1927, less than twenty years before the radical changes in international law facilitated by World War II, "States and states alone enjoy a locus standi in the law of nations: they are the only wearers of international personality."²² In other words, only states possessed full international legal personality, a status that allowed them to have both rights and duties under international law. This situation made sense when international law dealt primarily with relations between states: the creation of treaties, the laws of war, maritime law, jurisdiction over territories, etc.²³ So, Grotius' *De Jure Belli ac Pacis* established such foundational principles as the applicability of the laws of war to all parties without regard to the justness of the war, extraterritoriality of ambassadors, and freedom of the seas.²⁴ Of course, some of these rules dealt with the rights of individuals, but actions could only be considered violations of international law to the extent that they were injuries to the state.²⁵

After World War I, treaties and international organizations began to recognize the importance of protecting groups, and not just states, under international law.²⁶ The instability created in Europe by the presence of large minorities in many countries gave rise to *262 intensified interest in the rights of those minorities.²⁷ Woodrow Wilson's Fourteen Points, aiming at installing a durable international system, invoked the concept of self-determination to ensure the right of nations to choose their own governments.²⁸ Indeed, the victors of World War I worried that the presence of national minorities in a state could lead to another war, either through discriminatory treatment of the minority by the government or through excessive demands on the government by the minority.²⁹ Therefore, in the 1919 Paris Peace Conference, the victors imposed treaties on the defeated or reconfigured states aimed at guaranteeing fair treatment to members of minority groups.³⁰ These guarantees mandated that the states enable minorities to maintain their unique cultural, linguistic, religious, and other differences.³¹ At the same time, efforts to improve working conditions for laborers started to operate at the international level. The International Labour Office (now the International Labour Organization) was founded in 1919 to promote *263 better conditions for workers and their families.³² But despite the fact that groups were increasingly being recognized as important actors in the international arena, these efforts were limited in their focus and dealt to a large extent with individual states.³³ States still considered the treatment of their citizens as an internal matter.³⁴

After World War II, though, the international consensus on what amounted to internal affairs began to shift, and the individual became a more central party in international law.³⁵ The atrocities committed during the war by the Nazi regime forced states to reconsider the status of individuals in the international legal system.³⁶ Traditionally, the doctrine of state responsibility held that states could be held accountable for injuries to aliens, that is, non-citizens.³⁷ But if a state was

persecuting its own citizens, it could hardly be expected to hold itself accountable. In order to remedy this situation, the victorious Allied Powers thus committed themselves to prosecuting the members of the Nazi regime responsible for the most reprehensible crimes committed during the war.³⁸ In the ensuing Nuremberg trials, individuals were prosecuted for crimes against peace, war crimes, and crimes against humanity, including crimes committed by a state against its own nationals.³⁹ In the postwar period, pressure to create a kind of “international bill of rights” for individuals began to mount.⁴⁰ The Holocaust had exposed the flaws in the prevalent international legal regime, and many organizations believed that the only way to correct the flaws was to enshrine the human rights of individuals in an international treaty.⁴¹ Therefore, in the negotiations leading to the creation of the UN, groups like the American Law Institute, the International *264 Labour Organization, the American Jewish Committee, and the American Bar Association drafted potential bills of rights to be included in the UN Charter.⁴² Latin American states lobbied for the inclusion of a bill of rights as well, with twenty-one states coming out in favor of the bill after the Inter-American Conference on War and Peace.⁴³ While the Charter did not contain such a bill of rights, it did include a number of references to human rights. The Preamble states the determination of the signatories to “reaffirm faith in fundamental human rights.”⁴⁴ Article 55 commits the UN to promote “universal respect for, and observance of, human rights and fundamental freedoms for all”⁴⁵ Article 56 commits the members to “take joint and separate action . . . for the achievement” of universal respect for human rights.⁴⁶ Perhaps most importantly, Article 68 of the Charter calls for the creation of a commission for the promotion of human rights.⁴⁷ These commitments led President Harry Truman to say in his final address to the drafting conference that “[u]nder this document we have good reason to expect the framing of an international bill of rights, acceptable to all nations involved,” one that “will be as much a part of international life as our own Bill of Rights is a part of our Constitution.”⁴⁸

In the aftermath of the foundation of the UN, treaties and agencies devoted to the protection of individual human rights proliferated.⁴⁹ In 1946, the Human Rights Commission was formed.⁵⁰ In 1948, both the Convention on the Prevention and Punishment of *265 the Crime of Genocide⁵¹ and the Universal Declaration of Human Rights⁵² were adopted. In 1966, the International Covenant on Civil and Political Rights (ICCPR) was created.⁵³ Together, these treaties protect an impressive array of individual rights, from freedom of expression and religion to freedom from discrimination.⁵⁴

While the codification of individual human rights into international treaty regimes undoubtedly created socialization effects throughout the international system,⁵⁵ there remained a significant disconnect between the broad range of rights protected and the limited recourse that individuals had to enforce those rights.⁵⁶ The limitations were twofold: first, the treaties only bound the states that ratified them; and second, the individuals were forced to rely primarily on their own states to protect their rights, even if it was that very state that was violating these rights.⁵⁷

A fundamental tenet of customary international law and treaty interpretation holds that treaties become binding on a state only once *266 they have been ratified by that state.⁵⁸ This rule is not merely a de minimis restriction on the enforcement of individual rights. The United States, for example, habitually declines to ratify treaties that it has played an influential role in shaping. It has not ratified the Convention on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); or the Convention on the Rights of the Child (CRC).⁵⁹ Furthermore, it took twenty-six years for the Senate to ratify the ICCPR.⁶⁰

In addition, individuals whose rights were violated generally had to rely on their own state, rather than a separate entity, to remedy the wrong, even when it was the state that was violating the rights.⁶¹ With respect to the fulfillment of rights, only rarely does a treaty grant an individual the right to petition an international agency for redress against the violations of a state. One example is the Optional Protocol to the ICCPR, which states that an individual has an extremely limited right to submit a brief to an international committee of experts, which in turn can decide to commence an investigation of the purportedly violating state.⁶² CEDAW embodied the more traditional treaty form: the signatories committed themselves to protecting various rights of women, and a committee was formed to monitor compliance, but no right was bestowed upon individuals to petition for redress of particular violations of the treaty.⁶³ Only in 2000 did the General Assembly of the UN adopt an Optional Protocol to CEDAW, thereby granting individual women the right to petition a committee of experts to investigate violations of their rights.⁶⁴

*267 B. Evolution of the Responsibility to Protect

In the period after World War II and extending into the 1990s, the international community increasingly subscribed to an expansive view of individual rights under international law.⁶⁵ This awareness gave rise to the innumerable human rights treaties and organizations that exist to this day. At the same time, the concept of the inviolability of state sovereignty existed in uneasy equilibrium with the new world of human rights. In the 1990s, mass atrocities in far-flung parts of the globe pricked the consciences of many democratic publics, leading to humanitarian interventions to stop the conflicts.⁶⁶ The juxtaposition of the moral imperative of intervention with its concomitant illegality in the international system led to pressure

to change the legal rules governing the use of force. The result was the development in the early 2000s of the concept of the responsibility to protect, a radical departure from the foundations of international law but a logical response to the steady progression of individual rights.⁶⁷

It should be noted at this point that the inviolability of state sovereignty was codified in as important a document as the UN Charter of 1945. Article 2(7) of that document states that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state”⁶⁸ While this provision relates solely to the competence of the UN, intervention in the domestic matters of states by other states is also prevented by a customary norm of international law.⁶⁹ Despite the fact that the UN Charter was ^{*268} drafted before the proliferation of human rights treaties in the postwar period, it is clear that the noninterference principle was meant to include human rights issues, as the Charter mentioned the promotion of human rights as one of the UN’s purposes.⁷⁰ In other words, it was never foreseen that the violation of human rights could become a justification for the use of force. This abrogation of one *jus ad bellum* was incorporated into Article 2(4) of the UN Charter, which stated, “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”⁷¹

The reaffirmation of the principle of nonintervention in the UN Charter came in the face of the Nuremberg trials, which seemed to indicate that actors involved in the widespread violation of human rights could be prosecuted in the international system.⁷² After all, the drafters of the charter for the military tribunals at Nuremberg included a reference to crimes against humanity as a crime within the jurisdiction of the court.⁷³ But the principle of noninterference, according to the UN Charter, took precedence.⁷⁴ As one scholar has described the situation, “In this normative context, other rules of international law—including the principles of human rights—are only valid insofar as they are compatible with the basic norm of the non-use of force and the subsequent norm of non-interference in internal affairs.”⁷⁵

The Charter did contain one escape valve, though. Under Article 42, the Security Council could use such force “as may be necessary to maintain or restore international peace and security,” if it considered that other measures would be inadequate.⁷⁶ In other words, the UN ^{*269} Charter unequivocally bans the use of force by individual states and gives that right to the collectivity of states under the leadership of the Security Council.⁷⁷ But this sole method for maintaining international peace and, presumably, protecting individuals from widespread violations of their rights functioned abysmally in practice.⁷⁸ Paralyzed by the rivalry between the Soviet Union and the United States during the Cold War, the UN system betrayed its promise to be the source of a stable and durable peace.⁷⁹ The overlapping system of human rights treaties only served to highlight the impotence of the Security Council. So, in the 1970s, when Pol Pot was massacring millions in Cambodia, the world stood by.⁸⁰ Indeed, when Vietnam entered Cambodia to stop the Khmer Rouge, Vietnam was condemned for violating international law.⁸¹

With the fall of the Berlin Wall in 1989 and the end of the Cold War, hopes rose that the UN could assume the role envisioned for it by the founders. George H.W. Bush announced the beginning of a “New World Order” in which the UN and the United States would act together to maintain an “enduring peace.”⁸² Indeed, this optimistic ^{*270} pronouncement came after the successful completion of the Gulf War to force Iraq to retreat from its invasion of Kuwait, a war that was authorized by the UN and led by the United States and the United Kingdom to force Iraq to retreat from its invasion of Kuwait.⁸³

It soon became clear, though, that the end of the Cold War did not clear the impasse in the Security Council. The 1990s saw a number of intrastate conflicts erupt, from the former Yugoslavia to Somalia, and the Security Council proved helpless to stop the violence.⁸⁴ In some instances, force was authorized but the response was minimal and unhelpful—for example, in Rwanda and Somalia.⁸⁵ In some instances, the Security Council faced internal opposition and could not act—for example, in Kosovo in 1999.⁸⁶ In the latter case, the international community did end up intervening to prevent further violence between Serbian forces and Albanians, although this intervention lacked the UN imprimatur and thus faced criticism.⁸⁷

^{*271} The intervention in Kosovo jump-started a serious debate about the legality of humanitarian intervention in cases involving severe violations of human rights on a wide scale.⁸⁸ The North Atlantic Treaty Organization (NATO) had conducted the bombing raids on Serbia because it was obvious that Russia--and perhaps China--would have vetoed any attempts to authorize a resolution in favor of the use of force.⁸⁹ Some observers, including the Independent International Commission on Kosovo headed by former South African Supreme Court Justice Richard Goldstone, believed that the intervention was clearly illegal under international law because the UN Charter banned the use of force by states lacking explicit Security Council authorization.⁹⁰ The Former Republic of Yugoslavia (FRY) itself argued, in a case brought in front of the International Court of Justice (ICJ), that the war could not be legitimized by recourse to the concept of humanitarian intervention.⁹¹ Professor Ian Brownlie, a professor of international law at Oxford University assisting the FRY, articulated the view thus:

[T]he overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian

intervention, for three main reasons: first, the UN Charter and the corpus of modern international law do not seem specifically to incorporate such a right; secondly, state practice in the past two centuries, and especially since 1945, at best provides only a handful of genuine cases of humanitarian intervention, and, on most assessments, none at all; and finally, on *272 prudential grounds, that the scope for abusing such a right argues strongly against its creation.”⁹²

On the other hand, some commentators believed that the NATO intervention in Kosovo was legal, justified by some combination of previous Security Council Resolutions regarding Serbia’s treatment of ethnic Albanians, the importance of preventing further humanitarian catastrophe, and a state of necessity.⁹³ As State Department spokesman James Rubin explained, “the Serb side is so far out of line with accepted norms of international behavior, and the dangers of not taking preventative action are so great in terms of humanitarian suffering and further violations of international law that we believe we have legitimate grounds to act.”⁹⁴

The prevalent view, however, was that the intervention was “illegal but legitimate.”⁹⁵ The dilemma, concisely stated, was that intervention was simultaneously a moral imperative and a violation of the law. Richard Falk thus argued that the intervention was necessary but impossible: “It was necessary to prevent a humanitarian catastrophe in the form of ethnic cleansing. It was impossible because of the political unavailability of an appropriate means.”⁹⁶

In 2000, UN Secretary General Kofi Annan called this contradiction in the international legal system into stark relief: “[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica--to gross and systematic violations of human rights . . . ?”⁹⁷ Annan initially answered the question by arguing that the claims of national sovereignty should be weighed against the claims of individual sovereignty, but the fundamental dilemma remained.⁹⁸

To meet the challenge laid down by Annan, Canada established the independent International Commission on Intervention and State Sovereignty.⁹⁹ Its task was to develop clearer norms to guide *273 decision-makers faced with humanitarian disasters in the future.¹⁰⁰ After a year of research and discussions, the Commission issued a report concluding “that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe--from mass murder and rape, from starvation--but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.”¹⁰¹

More particularly, the Commission concluded that any humanitarian intervention must be for a just cause and must concord with certain precautionary principles.¹⁰² “Just cause” included interventions to prevent (1) “large scale loss of life” or (2) “large scale ‘ethnic cleansing.’”¹⁰³ The precautionary principles were (1) right intention, meaning for the purpose of halting human suffering; (2) last resort, meaning only after every nonmilitary option had been explored; (3) proportional means, meaning that the “scale, duration and intensity of the . . . intervention should be the minimum necessary to secure the defined human protection objective”; and (4) reasonable prospects, meaning that there “must be a reasonable chance of success in halting or averting the suffering.”¹⁰⁴ The Commission cited such developments in international law as the proliferation of human rights accords, changing state practice, and the responsibility of the Security Council for the maintenance of international peace.¹⁰⁵ These developments had elevated individual rights to a new level of importance in the international system, resulting in constraints on national sovereignty.¹⁰⁶

The Commission’s report was followed up by the Secretary-General’s High-Level Panel on Threats, Challenges, and Change, which embraced to a large extent the Commission’s recommendations.¹⁰⁷ The Panel stated:

We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large scale killing, ethnic cleansing or serious *274 violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.¹⁰⁸

The Panel listed the criteria for intervention as the following:

Seriousness of threat. Is the threatened harm to State or human security of a kind, and sufficiently clear and serious, to justify *prima facie* the use of military force? In the case of internal threats, does it involve genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law, actual or imminently apprehended?

Proper purpose. Is it clear that the primary purpose of the proposed military action is to halt or avert the threat in question, whatever other purposes or motives may be involved?

Last resort. Has every non-military option for meeting the threat in question been explored, with reasonable grounds for believing that other measures will not succeed?

Proportional means. Are the scale, duration and intensity of the proposed military action the minimum necessary to meet the threat in question?

Balance of consequences. Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?¹⁰⁹

The responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, as expressed in the Panel's report, has since received acceptance in the international community, including the Security Council. In 2005, the Outcome Document of the 2005 World Summit of the United Nations General Assembly explicitly recognized this duty as a binding norm of international law.¹¹⁰ The Security Council reaffirmed the same principle in a 2006 resolution.¹¹¹ But, importantly, the UN has excised references to "serious violations of international humanitarian law" as imposing a responsibility to protect on the international community.¹¹² As the norm stands ^{*275} today, then, the UN has only endorsed a responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. The progress from the days when state sovereignty was considered inviolate is breathtaking, but the historical arc beginning after World War II and culminating in the post-Kosovo War period just how logical and necessary the doctrine of responsibility to protect.

C. Free Speech and the Responsibility to Protect

For hundreds of years, the concept of inviolable state sovereignty pinned up the international legal regime, allowing states to act with impunity within their borders—even while constrained outside of them. But in the post-World War II period, the perceived exigency of protecting civilians from the predations of their own governments forced a reconsideration of that time-honored tradition. Beginning with the Nuremberg trials, then with the UN Charter, and finally with the numerous human rights treaties signed in the following years, actors on the international stage began to enshrine the rights of individuals in international law.¹¹³ These treaties protected a vast panoply of rights: free speech, freedom from discrimination, freedom of movement, and others.¹¹⁴ But there remained a disconnect between the aspirations of the reformers and state practice: the treaties only bound states willing to submit themselves to their obligations, and individuals continued to rely mainly on their own states to protect their rights.¹¹⁵ In the 1990s, though, a series of violent conflicts in various parts of the world such as Rwanda, Somalia, and Yugoslavia led many states to conclude that the current legal regime designed to protect the rights of individuals was flawed.¹¹⁶ Morality conflicted with law, and pressure built for the main actors to resolve the tension. Thus, the UN adopted the doctrine of a responsibility to protect: states had an affirmative duty to protect their citizens from genocide, war crimes, ethnic cleansing, and crimes against humanity, and if they failed in this duty, it fell upon the international community to step in and do it for them.¹¹⁷

^{*276} Unfortunately, this development has only created another internal contradiction: the world community's commitment to protect individuals from mass murder has betrayed the broader promise of the post-World War II period to grant individuals a wide range of rights under the international legal system. So, today, the UN and the world's most powerful states have promised to intervene to protect the right to life in some limited--if admittedly extreme--cases, but they have reneged on the assurances of the multitudes of human rights treaties to protect other basic individual rights.¹¹⁸ This contradiction is striking because the justifications for the responsibility to protect apply just as strongly, if not more, in respect to many of the other rights not included as justifications for intervention. Part III thus discusses the most storied "first freedom," the freedom of expression, in light of the creation of the emerging norm of a responsibility to protect.

III. The Freedom of Speech in International Law

A. Historical Origins

The concept of an individual right to free speech dates back at least to Athens and the writings of Plato and Euripides.¹¹⁹ Milton's translation of Euripides' play, *The Suppliants*, for example, contains these lines:

This is true Liberty when free born men

Having to advise the public may speak free,

Which he who can, and will, deserves high praise,

Who neither can nor will, may hold his peace;

What can be juster in a State than this?¹²⁰ Looking beyond the Western world, an individual's right to freedom of expression was also recognized in the Muslim world.¹²¹ But despite a *277 long line of distinguished supporters of the freedom of expression,¹²² it was not until 1789 that free speech was first incorporated in a country's bill of rights.¹²³ In The Declaration of the Rights of Man and the Citizen, the National Assembly of France declared that "the free communication of ideas and opinions is one of the most precious of the rights of man."¹²⁴ Then, in 1791, the United States Constitution, in its First Amendment, stated that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."¹²⁵ Since then, an individual's right to freedom of speech has become accepted in countries around the world.¹²⁶

When individual rights started to appear in international treaties after World War II, the freedom of expression was, without fail, included in the lists of fundamental rights.¹²⁷ A vast array of international and regional instruments set out the basic human rights that all individuals were entitled to, and each described the rights in slightly different fashions. A brief look at the variety of treaties will give a better understanding of the importance that freedom of speech bears in international law.

***278 B. International Instruments Concerning Free Speech**

1. The Universal Declaration of Human Rights

The UN Human Rights Commission, formed in 1946 in the aftermath of World War II, had the express purpose of preparing an international bill of rights that would describe the human rights component of the UN Charter.¹²⁸ Unsure whether to prepare a declaration or a treaty, it decided to do both: first, a nonbinding declaration, and then a binding convention.¹²⁹ In 1948, the General Assembly adopted the Commission's declaration, the Universal Declaration of Human Rights.¹³⁰ The Universal Declaration sets out individuals' basic civil and political rights, including the rights to life, security of one's person, fair trial, freedom of movement, and freedom of religion and expression.¹³¹ With respect to free speech, the Universal Declaration provides, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."¹³² This right is not absolute, though. According to the Universal Declaration, countries may place restrictions "solely for the purpose of securing . . . respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."¹³³

The Universal Declaration, as an international instrument, has had an unprecedented level of influence on international norms and state practice. While the Declaration was considered nonbinding by some countries when it was adopted,¹³⁴ it was generally understood as being truly universal.¹³⁵ Indeed, the Universal Declaration has achieved such widespread acceptance that one commentator has stated that it has "become a part of the common law of the world *279 community; and, together with the Charter of the United Nations, it has achieved the character of the world law superior to all other international instruments and to domestic laws."¹³⁶ Many countries have incorporated the document into their own constitutions,¹³⁷ and many more have based their constitutions' bill of rights on the protections enumerated in the Declaration.¹³⁸

2. The International Covenant on Civil and Political Rights

Pressed to complete an international bill of rights, the Human Rights Commission decided to draft a binding covenant in addition to the aspirational Universal Declaration of Human Rights. The result, the International Covenant on Civil and Political Rights (ICCPR), shared many of the provisions included in the Declaration but elaborated more fully on them. The ICCPR also included a (limited) mechanism for hearing complaints from individuals regarding violations of the treaty.¹³⁹

Again, freedom of expression held an exalted position in the demarcation of rights. According to the ICCPR, the right to hold opinions "without interference" was absolute.¹⁴⁰ No restrictions for any reason were permitted.¹⁴¹ In addition, freedom of expression included the "freedom to seek, receive and impart information of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."¹⁴² The positive content of the freedom of expression was limited by "special duties and responsibilities."¹⁴³ Therefore, the exercise of the freedom of expression could be subject to restrictions that were necessary (1) "for respect of the rights or reputations of others" or (2) "for the protection of national security or of public order, or of public health or morals."¹⁴⁴ The individual right of freedom of expression was *280 protected not just from governmental action but also from the actions of individuals.¹⁴⁵

The inclusion of a reference to "special duties and responsibilities" accompanying the exercise of the freedom of expression was a controversial proposition.¹⁴⁶ Countries supporting the inclusion of such a clause argued that free speech was a "precious heritage" that held tremendous power in public opinion and international affairs, thus justifying reference to the responsibilities of speakers.¹⁴⁷ But other states, including the United States, argued that all rights carry countervailing duties, and thus any specific reference to the duties inherent to free speech was unnecessary.¹⁴⁸ In the end, consensus was reached

on a clause that provided for special duties and responsibilities but narrowly limited the kinds of restrictions that could be imposed on the right.¹⁴⁹ The resulting definition of the right to freedom of expression was surprisingly broad, given the difficulty of getting so many divergent countries to agree on one version.¹⁵⁰

3. Convention for the Protection of Human Rights and Fundamental Freedoms

In the period immediately after the adoption of the Universal Declaration in 1948, many commentators in Europe worried that a binding treaty regarding international human rights would be difficult if not impossible under the auspices of the UN.¹⁵¹ Driven by the revulsion towards the recently perpetrated abuses of the Nazi regime, the Council of Europe drafted a Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention) designed to make the promises of the Universal ^{*281} Declaration binding on its member states.¹⁵² Today, the European Convention stands as the most successful and robust system to protect human rights in the world.

The European Convention created two bodies, the European Commission of Human Rights and the European Court of Human Rights, to ensure that member states comply with their obligations.¹⁵³ An optional protocol empowers individuals to petition the Commission directly for any alleged violation of their rights under the European Convention.¹⁵⁴

The European Convention's provisions regarding freedom of speech are naturally very similar to those provisions in the ICCPR because both documents are based on the Universal Declaration of Human Rights.¹⁵⁵ The one exception is the inclusion of a long list of limitations on the freedom of expression in the European Convention. Article 10 of the European Convention states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. . . .
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹⁵⁶ The extensive list of restrictions on an individual's right to exercise his freedom of speech stems from the fewer number of participants in the negotiations and the consequently higher level of consensus ^{*282} between member states as compared to the ICCPR.¹⁵⁷ The temporal and geographical closeness of the war created a stronger unity in Europe with respect to this issue.¹⁵⁸ The United States itself would not go so far. Indeed, in the ICCPR negotiations the United States was one of the most active proponents of a relatively unrestricted freedom of speech, for the reason that its own jurisprudence was consistent with such a view.¹⁵⁹

4. American Convention on Human Rights

In 1948, twenty-one countries in Latin America joined together to defend their territorial integrity and promote peace and justice under the Organization of American States.¹⁶⁰ In the same year, a few months before the UN adopted the Universal Declaration, they adopted the American Declaration of the Rights and Duties of Man.¹⁶¹ Just as with the Universal Declaration, a subsequent document, the American Convention on Human Rights elaborates upon the extent of the obligations provided for in the American Declaration.¹⁶² The American Convention, like the European Convention, set up an Inter-American Commission on Human Rights to review alleged human rights violations and an Inter-American Court of Human Rights to hear appeals.¹⁶³

^{*283} The right to freedom of expression contained in the American Convention is almost identical to that found in the International Covenant.¹⁶⁴ Article 13 of the American Convention states that "[e]veryone has the right to freedom of thought and expression."¹⁶⁵ It also prohibits indirect methods of restricting expression, such as unfair allocation of newsprint or broadcasting frequencies, a restriction that applies both to private persons as well as the government.¹⁶⁶ On the other hand, it requires states to prohibit war propaganda and advocacy of national, racial, or religious hatred.¹⁶⁷

The American Convention's free speech clauses are the most far-reaching of any human rights treaty.¹⁶⁸ Indeed, the American Court has articulated the view that the American Convention's guarantees of freedom of expression are "more generous" than those guaranteed in the European Convention.¹⁶⁹ The treaty's provisions with regard to free speech evince an intent to reduce to the absolute minimum restrictions on the free exercise of speech.¹⁷⁰

5. African Charter on Human and Peoples' Rights

Until 1986, African countries adhered to the doctrine of non-interference with the internal affairs of other member states of the Organization for African Unity (OAU).¹⁷¹ But in response to serious human rights abuses in Africa during the 1970s and

1980s, as well as Tanzania's invasion of Uganda, the OAU decided to draft an African *284 Charter on Human and Peoples' Rights to promote individual and group rights in Africa.¹⁷²

The Charter establishes a framework for protection of human rights that is generally considered weaker than the frameworks of other comparable human rights treaties.¹⁷³ True, the Charter creates a Commission "to promote human and peoples' rights and ensure their protection in Africa."¹⁷⁴ But the Commission's investigations of violations of the treaty must be confidential unless authorized by the Assembly of Heads of State of the OAU.¹⁷⁵ A former Secretary General of the OAU has described the Commission as "far from being an organ with jurisdiction for protection of human rights."¹⁷⁶ The Charter also contained no provision for a court of human rights. Instead, it opted for mediation, consensus, and conciliation, in order to conform with African customs and practices.¹⁷⁷ In 2004, however, an African Court on Human and Peoples' Rights was formed to rule on compliance with the African Charter.¹⁷⁸ It has had limited success.¹⁷⁹

The Charter guarantees every individual's right "to receive information" and "to express and disseminate his opinions within the law."¹⁸⁰ It does not have any express reference to restrictions on the right of free expression, although it is subject to the general restrictions set forth later in the document, which clarify that individuals must exercise their freedoms "with due regard to the rights of others, collective security, morality and common interest."¹⁸¹

*285 C. The International Law on Free Speech as Expressed by International Treaties

The number of international and regional legal instruments protecting the freedom of speech demonstrate just how established that right is as an international norm. While the treaties each express the right in a slightly different way, there are some basic concepts to which all ascribe. Together, the treaties cover the overwhelming majority of the world's countries and therefore have vast importance for the explanation of any truly universal right to freedom of speech.

Countries ratifying any of the abovementioned human rights treaties accept two obligations: (1) to adopt statutes or other measures necessary to protect the rights guaranteed by the treaty and (2) to remedy any violations of the rights.¹⁸² The ability of individuals to petition for redress of violations, however, varies significantly. The European Convention provides a robust system for individual complaints, while the ICCPR contains none, except in the Optional Protocol.¹⁸³

The content of the guarantee of the freedom of expression in the various treaties is, for the most part, relatively uniform. An individual right to hold opinions without interference is declared by both the Universal Declaration of Human Rights and the ICCPR, and the American and European Conventions are understood to protect the right as well.¹⁸⁴ The African Charter makes no mention of the right.¹⁸⁵ The right to seek, receive, and impart information and ideas is explicitly provided for in the Universal Declaration, the International Covenant, and the American Convention.¹⁸⁶ Both the European Convention and the African Charter are assumed to protect this right as well.¹⁸⁷

All the treaties also establish a test for determining the legitimacy of restrictions on the freedom of speech. They generally require that any restriction must (1) be provided by law; (2) serve one of the legitimate purposes enumerated in their texts; and (3) be necessary.¹⁸⁸ Although some of the treaties detail the legitimate *286 reasons for restrictions with greater specificity,¹⁸⁹ all provide some variation on the themes of respect for the rights of others, public order, and morals.¹⁹⁰

International treaties thus show substantial consensus on the broad contours of the individual right to freedom of expression. The Universal Declaration provides the most widely accepted articulation of that freedom, achieving the status of "world law superior to all other international instruments and to domestic laws."¹⁹¹ Regional treaties have tweaked the individual right, but for the most part they have reaffirmed the concept. The problem, though, lies in implementation. Other than the European Convention, the mechanisms for enforcing the obligations of states under the treaties are faulty or non-existent. The ICCPR, which elaborates on the meaning of the Universal Declaration, is enforceable only to the extent that states ratify the Optional Protocol, and even then is of questionable value.¹⁹² The African Charter created no court of human rights, and such a court was formed only in 2004.¹⁹³ The American Convention does have a court, but its duties are limited *287 and its ability to hear cases is entirely dependent on the decision of a separate commission.¹⁹⁴

So, the human rights treaties make a number of promises to individuals about their right to free speech, but they provide scant means of enforcement. And without enforcement, the impressive guarantees made by human rights instruments lose much of their force. States that do not expect to have their commitments enforced on them feel free to make them willy nilly.¹⁹⁵ If that is true, then how can one close the gap between rights and remedies in international law? The next Part will address precisely this question.

IV. The Responsibility to Protect, Sovereignty, and Free Speech

Returning to the issue of state sovereignty, the exclusion of free speech, among other fundamental rights codified in

international treaties of the twentieth century, from the pantheon of rights, the violation of which called for the intervention of the international community, was reminiscent of the pre-World War II period, in which states were the primary--even sole--actors in international affairs and international law. Indeed, the position of the General Assembly and the Security Council, with respect to the violation of individual rights not involving genocide and crimes against humanity, seems to wholeheartedly affirm the position of Yugoslavia in 1999 that "[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State."¹⁹⁶ While the ICJ dismissed the case for lack of jurisdiction and thus did not address the merits of Yugoslavia's position, that position is by now nearly universally discredited.

***288** The essential problem with the pre-World War II legal regime was that it acknowledged state sovereignty as the building block of international relations and therefore treated it as inviolable. This system left individual citizens at the whim of their governments, only able to enforce their rights to the extent that the state considered appropriate.¹⁹⁷ Even after the proliferation of human rights treaties delineating the rights of individuals under international law, the inviolability of state sovereignty remained a tenet of the law of nations. For example, in the famous case of *Banco Nacional de Cuba v. Sabbatino*, the U.S. Supreme Court upheld the act of state doctrine, by which the decisions of foreign countries relating to their internal affairs would not be questioned.¹⁹⁸ The court explained as follows:

Because of [international law's] peculiar nation-to-nation character the usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal.¹⁹⁹ And this redefining of international law's peculiar nation-to-nation character--giving the state the principal role in global discourse--was crucial to the pre-World War II era.²⁰⁰ Any interference with the internal affairs of states was seen as illegal and unnecessary meddling. Foreign intervention, even by a group of states, was a violation of the baseline rule of inviolable state sovereignty, at least as far as it concerned intrastate conflict.

As the historical discussion above makes clear, however, this line of thought became unsustainable after World War II, when the full extent of the horrors of the Holocaust became clear. The atrocities committed by the Nazi regime on its own citizens shocked the conscience of the world and demanded a rethinking of the fundamental contours of the previous legal system. Thus, in treaty after treaty, nation states agreed that individual rights were an important component of international law.²⁰¹ With the relatively recent development of a responsibility to protect individuals from certain severe crimes, such as genocide and crimes against humanity, legal scholars and international organizations have paved the way for ***289** a more morally intuitive approach towards evaluating the legality of intervention. The right of state sovereignty had to be balanced against the competing claims of individuals to their own rights. Kofi Annan, writing in 1999, described the situation as follows:

State sovereignty, in its most basic sense, is being redefined--not least by the forces of globalisation and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty--by which I mean the fundamental freedom of each individual, enshrined in the charter of the UN and subsequent international treaties--has been enhanced by a renewed and spreading consciousness of individual rights. When we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.²⁰² This view of the concept of state sovereignty was explicitly adopted both by the UN General Assembly and the Security Council, giving it full recognition in international law.²⁰³

In its core assumptions, the international legal system's treatment of free speech is eerily similar to the pre-World War II treatment of internal affairs. Take, for example, the case of Tibet. Human rights organizations such as Human Rights Watch have documented widespread violations of free speech: thousands of Tibetans have been sent to prison for exercising the freedom of expression concerning Tibetan independence, freedom to profess one's religion has been severely limited, and other violations abound.²⁰⁴ But when the Chinese government was confronted with criticism of its treatment of Tibetans, it responded with a typical state sovereignty argument:

What happens in Tibet is an internal affair of China. The Chinese Government resolutely opposes any interference in the Tibet issue, which is our internal affair. We urge relevant countries to respect China's sovereignty and territorial integrity, respect the universally recognized norms governing international relations, and do not support the Dalai Clique's separatist activities in any form under any excuse. I would like to stress that the Chinese Government has the ***290** determination and capability to safeguard our sovereignty and territorial integrity.²⁰⁵ Therefore, the language of inviolable state sovereignty still holds traction in international legal discourse. For this reason, China saw intervention to prevent violations of the numerous fundamental rights guaranteed by binding international treaties as a violation of the more important international norm of sovereignty and non-interference. Indeed, the Chinese position does appear to be an accurate restatement of the current state

of the law. While the General Assembly and Security Council resolutions with regard to genocide and ethnic cleansing established a new international norm with respect to those very limited circumstances, the position of free speech in the international system remains subordinate to state sovereignty. Just as the execution of a state's own citizens once was considered an internal matter not warranting international concern, so too the freedom of expression now stands an internal matter not brooking any kind of foreign meddling.

Under the current understanding of the international law of free speech and the previous understanding of genocide and ethnic cleansing, the old fundamental tenet of the law of nations, state sovereignty, remains alive: the state has exclusive control over its territory and people.²⁰⁶ But the assumptions underlying that concept have eroded since World War II, and it has become clear that the state owes certain obligations to its citizens.²⁰⁷ A world that demands respect for human rights, including within the borders of a state, cannot coexist with a world that demands absolute respect for state sovereignty.²⁰⁸ Despite all the advantages (i.e., stability, clarity, and national security) of sovereignty, the nonintervention principle is legitimately subject to certain exceptions--at least to a limited extent--if the purpose of intervention is for just reasons and sufficient benefits are expected to accrue from it.²⁰⁹ This, at least, is the dominant theory of the post-World War II era. What is not sufficiently realized today, but what is undeniably valid, is that this logic applies equally to both interventions to protect populations from ^{*291}widespread violations of their right to free expression and interventions to protect from genocide. Here, as elsewhere, human rights treaties have guaranteed to the people of the world certain rights--rights that now form part of the nucleus of international law.²¹⁰ The respect for state sovereignty does not trump these rights any more in the area of free speech than in the area of genocide. Indeed, if one looks to the rationales for state sovereignty, one sees that respect for free speech and other human rights embodied in the multitude of human rights treaties serves these purposes better.

The lack of any intervention norm with regards to speech is to a certain extent even more surprising than the previous position of international law with regard to crimes against humanity. Free speech is one of the oldest and most respected rights in the history of civilization, one that is often referred to as the "first freedom."²¹¹ A long and respected jurisprudence protecting citizens' right to freedom of expression exists in almost every state. Efforts to protect free speech require relatively less commitment than efforts to protect populations from forceful and determined military actions. International intervention to preserve individuals' free speech rights should not be regarded as an impermissible interference or an assault on state sovereignty. The foundations of the concept of state sovereignty have eroded since World War II, and the power of states within their own borders is constantly changing. In some ways, globalization has expanded the power of states to express their message and monitor their citizens. In others, it has disassembled the very idea of a sovereign country.²¹² In any case, a system that ^{*292}promises "universal" respect for human rights cannot simultaneously posit that state sovereignty stands as a higher value than those rights. The international community's responsibility to protect must encompass not just the protection of a limited selection of individual rights but also the wide range of fundamental rights guaranteed by international human rights treaties.

V. Rationales for the Responsibility to Protect

The responsibility to protect as a doctrine in international law has developed in fits and starts. Its primary proponents, including the UN, have used a miscellany of justifications without properly identifying how each applies.²¹³ Scholars have generally approached the question using the lens of policy analysis and thus have muddied the waters.²¹⁴ In general, though, arguments in favor of and against the adoption of a responsibility to protect in international law fall into three categories: moral, legal, and consequential. Moral arguments about the responsibility to protect tend to focus on the deontological obligations of the international community towards individuals subject to violations of their rights.²¹⁵ In other words, it would be wrong for the international community not to intervene when a state is engaged in a campaign of genocide against a portion of its population. Legal arguments, on the other hand, look at the UN Charter, subsequent human rights treaties, and interpretations of international law to argue that states have a legal duty to intervene in certain situations.²¹⁶ Any such arguments have to confront the interminable problem of the UN Charter's outlawing of the use of force outside of self-defense.²¹⁷ Finally, consequential arguments ^{*293}tend to focus on the bad results that would occur if the international community did not intervene in cases of genocide, crimes against humanity, or ethnic cleansing. Such bad results range from spreading instability, to excessive human suffering, to a breakdown of international law.

Inevitably, these arguments tend to run together. Moral arguments about the need to intervene usually consider the effects of not intervening.²¹⁸ Legal arguments have to look both at international norms and at consequences. Indeed, the two most important documents describing the international doctrine of responsibility to protect seem to use all three justifications.²¹⁹

But this Part will attempt to look at the various justifications in turn and separately in order to flesh out the assumptions underlying the concept of a responsibility to protect. Only after doing so can one begin to understand the compelling need for a broader concept of a responsibility to protect—one that, at a bare minimum, includes the protection of the freedom of speech.

A. Moral Arguments for the Responsibility to Protect

States, international organizations, and scholars of international law have deployed a wide variety of moral arguments to justify the adoption of a responsibility to protect, and it is beyond the scope of this Article to consider all of them.²²⁰ However, in recent years, three ^{*294} leading accounts of the morality of intervention have emerged. They are (1) the higher moral value placed on individual rights than on state integrity; (2) John Rawls's argument in favor of an international law of well-ordered peoples; and (3) Michael Walzer's appeal to the virtue of communal autonomy.

First, some commentators argue that individual rights take moral precedence over any right of states to nonintervention.²²¹ Kofi Annan has expressed this viewpoint, stating that “even harder experience has led us to grapple with the fact that no legal principle—not even sovereignty—should ever be allowed to shield genocide, crimes against humanity and mass human suffering.”²²² Indeed, the international law scholar Fernando Tesón begins with the proposition that, from an “ethical standpoint,” governments are solely agents of their people and “[those governments'] international rights derive from the rights of the individuals who inhabit and constitute the state.”²²³ Thus, when a government violates the rights of its citizens, it ceases to hold a legitimate claim to respect of its territorial integrity.

A second line of thought is espoused by John Rawls in his book *The Law of Peoples*, in which he argues that international law should adopt the principles that all would adopt in a negotiation, unaffected by different distributions of power among representatives of people whose institutions and political culture are “well-ordered.”²²⁴ The participants in such negotiations would adopt a principle to “observe ^{*295} a duty of non-intervention,” but not an absolute one.²²⁵ This nonintervention norm requires a high standard of political order: the state must provide substantive freedom and equality for all citizens.²²⁶ For Rawls, this prescription means that all citizens must be able to participate in the political process in an effective and informed way.²²⁷ If a regime is not well-ordered, then the nonintervention norm loses its force. Such would be the case, Rawls postulates, in a modern-day Aztec society that “holds its lower class as slaves, keeping the younger members available for human sacrifices in temples.”²²⁸ There would be no moral objection to intervening in this case because the society so obviously lacks the basic requirements of a well-ordered society.

A final moral argument in favor of a responsibility to protect is that the self-determination of political communities has inherent moral importance.²²⁹ As articulated by Walzer, the basic moral principle is “always act so as to recognize and uphold communal autonomy.”²³⁰ One corollary of this principle is that there is a strong presumption that any intervention would violate the right to self-determination of the political community.²³¹ These norms facilitate respect for cultural differences and political preferences. But in some situations, the presumptions should be disregarded. Most importantly, even though “‘ordinary’ oppression” does not call for intervention,²³² intervention is acceptable to end massive violations of human rights that are so severe that “we must doubt the very existence of a political community to which the idea of self-determination might apply.”²³³ In this case, no deference should be given to the decisions of a sovereign state.

The moral arguments justifying a responsibility to protect, then, revolve around the idea that, at least in severe cases of violations of individual rights, it is morally defensible—if not obligatory—for the international community to intervene in a state's internal affairs to prevent further such violations. Deontologically, the argument goes, humanitarian intervention is right, and, to the extent that law should ^{*296} track morality, it should also be legal. The next subpart examines the legal arguments behind the responsibility to protect.

B. Legal Arguments for the Responsibility to Protect

Much of the debate surrounding the responsibility to protect has focused on whether humanitarian intervention is legal under the existing international legal framework. Thus, arguments tend to look to the foundational sources of international law: the UN Charter, treaties, and customary international law. Legal arguments in favor of humanitarian intervention have a long history in international relations, but this Article focuses on the more recent debate.²³⁴

The UN Charter does not explicitly authorize humanitarian intervention or the responsibility to protect. Indeed, it appears to do the opposite: according to Article 2 of the Charter, “All Members shall refrain in their international relations from the

threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”²³⁵ The Charter does, however, commit the UN to promote “universal respect for, and observance of, human rights and fundamental freedoms for all . . .”²³⁶

The combination of these two provisions has led some lawyers to argue that the Charter authorizes, or even commands, intervention to protect individuals from human rights violations through the assertion that such interventions are not aimed at the “territorial integrity” or “political independence” of a state.²³⁷ In this line of thought, the UN Charter was intended to prevent wars of aggression and was not intended to protect states from international judgment on crimes committed against its citizens.²³⁸ When the international community intervenes, it does so with pure intentions, and thus the responsibility to protect does not fall afoul of the Charter’s prohibition against the use of force.

***297** The UN’s High-Level Panel on Threats, Challenges and Change reached its legal conclusion that the responsibility to protect is a legally obligatory norm by looking at the 1948 Genocide Convention as well.²³⁹ According to the High-Level Panel, “Since then it has been understood that genocide anywhere is a threat to the security of all and should never be tolerated.”²⁴⁰ The UN Charter states that the maintenance of peace and security is one of the UN’s principal aims.²⁴¹ Therefore, the High-Level Panel concluded the following:

The principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing, which can properly be considered a threat to international security and as such provoke action by the Security Council.²⁴²

Even if the UN Charter does not provide for a responsibility to protect, some scholars have argued that when the Security Council is deadlocked, a preexisting right of humanitarian intervention under customary international law should revive.²⁴³ A rule of customary international law develops through state practice with a sense of legal obligation (*opinio juris*), generally repeated over time by a significant number of states.²⁴⁴ In the case of humanitarian intervention, states have long justified the use of force to protect civilians from the predations of their own governments.²⁴⁵ Professor Rusen Ergec, speaking before the ICJ, highlighted India’s intervention in Eastern Pakistan, Tanzania’s intervention in Uganda, Vietnam’s intervention in Cambodia, and the West African countries’ interventions in Liberia and Sierra Leone.²⁴⁶ If one adds to this list interventions in the 1990s, it becomes clearer and clearer that states do routinely practice the responsibility to protect, and they often couch their arguments in the language of legal discourse.²⁴⁷

***298** Critics of this viewpoint note that in the seminal case of *Nicaragua v. United States*, the ICJ concluded that custom did not permit unilateral humanitarian intervention.²⁴⁸ But the ICJ decided this case long before the widely accepted interventions in the 1990s and the adoption by both the General Assembly and the Security Council of resolutions pronouncing the responsibility to protect.²⁴⁹ These developments have significantly changed the state of customary international law.

Some observers argue that even if a rule of customary international law in favor of a responsibility to protect does not exist, general principles of international law, in particular the doctrine of necessity, require intervention in severe cases of violations of human rights.²⁵⁰ A state of necessity is defined as “the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State.”²⁵¹ As applied to humanitarian intervention, the state of ***299** necessity argues that while intervention may violate the UN Charter’s prohibition of the use of force, the intervenor’s essential interest excuses the act as a matter of international law.²⁵² Some proposed essential interests, the values of which exceed the value of nonintervention, include “the commission of genocide [,] . . . widespread or systematic attacks against a civilian population, or serious violations of recognised and fundamental international human rights.”²⁵³

Necessity, then, is a kind of safety valve through which the international community can avoid the undesirable consequences of a strict adherence to international rules governing the use of force.²⁵⁴ There is some debate about whether a state of necessity makes an otherwise illegal act legal or whether it just makes it excusable;²⁵⁵ regardless, it has been invoked as a justification in numerous occasions. For example, Belgium, brought before the ICJ for NATO’s intervention in Kosovo, gave the following defense listing the elements of necessity:

First, what rule has been breached? We do not accept that any rule has been breached. However, for the sake of argument, let us say that it is the rule prohibiting the use of force. Where is the imminent peril, the grave and imminent peril? There it was-- . . . there it is still--the humanitarian catastrophe recorded in the resolutions of the Security Council--an impending peril. What are the higher values which this intervention attempts to safeguard? They are rights of *jus cogens*. It is the collective security of an entire region.²⁵⁶

Necessity, a general principle common to many national legal systems and universally recognized as a part of international law, has *300 served as a legal bastion and a strong justification for the responsibility to protect. It at once allows the principle of nonintervention to stand as a legal rule while creating some wiggle room for states to intervene in extreme cases. In the end, however, it must make some reference to the consequences of inaction and engage in some balancing of harms and benefits. The following subpart addresses consequential arguments in favor of a responsibility to protect.

C. Consequentialist Arguments for a Responsibility to Protect

Consequential, or utilitarian, arguments in favor of a responsibility to protect tend to focus on the ability of intervening nations to stop widespread harm at some minimal cost.²⁵⁷ Sometimes, the analysis is limited to the particular crisis--such as Kosovo and the cost of a bombing campaign to stop the persecution of ethnic Albanians.²⁵⁸ Sometimes, the analysis looks at more long-term results, such as the precedent that humanitarian intervention would set.²⁵⁹ What draws all the arguments together is the assertion that, looking at the costs and benefits of intervention, adoption of a responsibility to protect is justified.²⁶⁰ At their core, of course, consequential arguments are moral, in that their ultimate conclusion, based on a cost-benefit analysis, is that intervention is right.²⁶¹ But they differ from the deontological moral arguments described above because they do not argue that the acts in themselves are moral but that, as a result of a balancing of harms, the action is justified.²⁶²

A utilitarian approach to international humanitarian law is widely accepted in both the law and scholarly publications. According to the Geneva Conventions, the legality of attacking a particular target depends on whether the incidental damage that is to be expected from the attack is excessive in relation to the anticipated *301 military advantage.²⁶³ Indeed, the very definition of a responsibility to protect appears to adopt a utilitarian approach. The ICISS's report, *A Responsibility to Protect*, states that the responsibility to protect is "the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe--from mass murder and rape, from starvation--but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community."²⁶⁴ The report thus endorses the view that a state has a responsibility to intervene if it can avoid a catastrophe. The term "avoidable" appears to make some reference to a cost-benefit analysis because, if the costs of stopping a catastrophe exceed the benefits, then it would create another type of catastrophe.²⁶⁵ Or, as a prominent philosopher has expressed it:

If the saving of lives is crucial, it may well be that the lives of more citizens of any particular state would be better protected by the initiation of war than by the virtually unqualified respect for territorial integrity . . . [I]t seems to me that it must . . . be shown that fewer lives will be lost in the process [of intervention].²⁶⁶ Both of these approaches, then, focus narrowly on the cost of intervention and the benefits in terms of lives saved.

Other utilitarian theories of a responsibility to protect consider a wider variety of consequences of intervention. Instead of focusing solely on the intervention itself, they look to the long-term consequences for the international system and global governance. The UN's High-Level Panel itself worried about the consequences of not adopting a responsibility to protect. They argued that it would be unacceptable if states could invoke the principle of nonintervention in internal affairs to protect genocidal acts or other atrocities.²⁶⁷ Setting such a precedent would only encourage countries to persecute politically unfavorable or powerless groups with full knowledge that they could do so with impunity.²⁶⁸

*302 Establishing a robust principle of the responsibility to protect, on the other hand, would send a strong signal to countries around the world: criminal acts against a state's own citizens will not go unpunished. This concept is one of the main goals of international law, that is, to establish internal law as a binding obligation that cannot just be followed when convenient and ignored when needed.²⁶⁹ Indeed, some observers have argued that the development of a responsibility to protect is essential to the survival of the current international legal system.²⁷⁰ The strength of a legal system is connected above all to its legitimacy in the eyes of its constituents.²⁷¹ A system that makes it illegal to act in the face of "the universally recognized imperative of effectively halting gross and systematic violations of human rights with grave humanitarian consequences"²⁷² loses its legitimacy in the eyes of both populations and states themselves.²⁷³

VI. The Case for a Responsibility to Protect the Freedom of Speech

A brief survey of the major rationales used to justify the adoption of a responsibility to protect in international law demonstrates the strength of the argument for extending such a responsibility to protect to the freedom of speech. Every rationale for the adoption of a responsibility to protect has equal application in the case of violations of the freedom of expression as it does in the case of genocide, crimes against humanity, and ethnic cleansing. In some cases, the argument that the international community has a responsibility to protect the freedom of speech of individuals may be even stronger.

*303 A. Moral Arguments

Moral arguments that place the value of individual rights above the value of territorial sovereignty naturally apply to the freedom of expression. Free speech is indubitably a fundamental human right, as expressed in every major international human rights instruments since World War II.²⁷⁴ Protection of this right, then, carries greater importance than upholding the now antiquated notion of inviolable state sovereignty.

A different logic applies with moral arguments that propose an international law based on the choices of a well-ordered society. Rawls argues that such a society would choose to incorporate a doctrine of nonintervention in order to give due regard to cultural differences.²⁷⁵ Such a system would seem to preclude the intervention of the international community in order to protect the freedom of speech of another country's citizens. But Rawls is careful to note that the nonintervention norm applies only when the state guarantees freedom and equality for all, a condition met by allowing all citizens to participate in the political process.²⁷⁶ Freedom of speech is essential to participating effectively in the political process.²⁷⁷ Without the ability to express one's ideas in an effective way, a citizen cannot meaningfully participate in government debates. If the freedom of speech is squelched, then Rawls's preconditions for a well-ordered society are not met, and a state loses its presumption of territorial integrity. The international community must intervene in order to allow the effective speech.

Walzer's moral position that the intervention of the international community violates the right to self-determination of political communities also creates a nonintervention presumption. In other words, "[i]ntervention usually thwarts, to some extent, political processes and aspirations which are, to some extent, worthy of respect."²⁷⁸ But Walzer himself admits that oppression of one's citizens may negate the presumption.²⁷⁹ The presumption should be *304 overridden, he argues, when "we must doubt the very existence of a political community to which the idea of self-determination might apply."²⁸⁰ Cases of genocide, ethnic cleansing, and crimes against humanity definitely amount to such massive violations of human rights, but so too do violations of the freedom of expression. Indeed, self-determination within the context of a political community depends to a great extent on the ability of citizens to debate and air their ideas. When such debate is stifled, the decisions of the government as representative of the will of the people must be doubted. The international community, then, if it truly wants to respect the self-determination of peoples, must protect above all the freedom of speech.

B. Legal Arguments

Like moral arguments, legal arguments in favor of a responsibility to protect appear to apply equally to violations of the freedom of expression as they do to violations such as genocide and crimes against humanity. The relevant legal precedents, with the exception of the most recent developments actually articulating the responsibility to protect, do not differentiate between genocide and gross violations of human rights.²⁸¹

The UN Charter, for example, outlaws the use of force but refers to its commitment to promoting universal respect for, and observance of, human rights.²⁸² It makes no distinction between genocide and other violations of human rights.²⁸³ Some scholars argue that intervention due to a responsibility to protect is not aimed at the territorial integrity or political independence of a state.²⁸⁴ This argument would appear to apply equally to any kind of human rights violation. The established nature of the freedom of expression in international law, as evidenced by the multiple human rights treaties, certainly allows the conclusion that intervention to protect this fundamental right is legal under the UN Charter.

The argument from the perspective of customary international law holds just as much force. The question here is whether, as a matter of customary international law, states have repeated a practice with a sense of legal obligation.²⁸⁵ It is true that most *305 humanitarian interventions in the past century have been intended to stop the mass killings of civilians.²⁸⁶ At the same time, however, they also often involve the suppression of expression, particularly religious expression.²⁸⁷ Obviously, debates about customary international law will always revolve around how broadly or narrowly one should interpret a custom, but one legitimate interpretation is that custom allows intervention in the affairs of a state in order to prevent widespread suppression of the freedom of speech--especially if such intervention is carried out by an international coalition with proper purposes.²⁸⁸

Likewise, the state of necessity provides a legal basis for a responsibility to protect in cases of severe violations of the freedom of expression. In order for necessity to justify an action, a state must have an essential interest threatened by a grave and imminent peril, and the sole means of safeguarding that interest must be to act not in conformity with a particular rule of international law.²⁸⁹ The essential interest involved here is the protection of a fundamental human right: the freedom of speech. In fact, commentators generally seem to accept the notion that severe violations of fundamental rights should be

included as essential interests.²⁹⁰ If the sole means of preventing a state from depriving its citizens of such a fundamental right as the freedom of speech is to intervene, then the doctrine of necessity provides firm ground for doing so.

C. Consequential Arguments

What of utilitarian arguments? At the broader level, in terms of setting a standard that states cannot deny their citizens basic human rights, the argument seems to apply perfectly to the freedom of speech. International treaties establish a clear commitment of the world community to protecting the right of an individual to communicate and receive ideas.²⁹¹ If international law wants to ensure the protection of this right, it would make sense to create a **306* norm by which countries have an obligation to intervene to prevent a government from depriving its citizens of the right. States considering actions that would suppress the freedom of expression of their citizens would therefore know that they would face a backlash from the international community. They would know that they could not hide behind the shield of sovereignty.

So, too, would the extension of the responsibility to protect to include the freedom of speech have positive consequences for the legitimacy of the international legal system. The proliferation of human rights treaties after World War II raised expectations that individual rights would no longer be subject to the whims of nation-states.²⁹² International instruments like the Covenant on Civil and Political Rights and the Universal Declaration of Human Rights guarantee certain rights to all citizens.²⁹³ But the lack of enforceable provisions makes these guarantees illusory. A system that simultaneously promises universal respect for the freedom of speech and refuses to take steps to protect that freedom faces severe contradictions, contradictions that threaten the legitimacy of the system. If the international community adopted a broader responsibility to protect, this discrepancy could be solved, with favorable consequences for the entire legal system.

A more difficult situation arises when one considers just the immediate consequences of intervention to protect freedom of expression. If the equation of costs and benefits includes only lives saved and lost, the suppression of expression may seem like a trivial crime because it does not directly cause the loss of any lives. Any military intervention to protect this freedom would probably lead to the loss of human life, thereby causing costs to exceed benefits. For this reason, intervention must be considered in a broader sense. Intervention does not necessarily need to be military intervention. Kofi Annan himself has recognized the imperative of considering intervention as something encompassing more than just the use of force. In 1999, after the Kosovo bombing campaign, he wrote in *The Economist*, "A tragic irony of many of the crises that go unnoticed or unchallenged in the world today is that they could be dealt with by far less perilous acts of intervention than the one we saw this year in Yugoslavia."²⁹⁴

One potential form of intervention could involve using the internet to spread the message of individuals whose speech is being suppressed. This technique would allow those individuals more effective access to an audience. Radio and television are still **307* powerful methods of communication as well, and interventions similar to the broadcast of Radio Free Europe into the affected countries could have strong effects.²⁹⁵ Such interventions would have to be aimed at granting citizens the ability to communicate and receive ideas that would otherwise be suppressed by the government.

This is not to dismiss the ultimate option of military intervention. Active suppression of political dissent in a wide subset of society, including through the use of torture and imprisonment to exclude groups from asserting their political will, might justify the use of military force. This is instead meant to explain that military intervention need not be considered the sole form of intervention and that the spread of internet access, among other communication outlets, opens new avenues for citizens to share information and debate ideas.

VII. Criticisms

Two major criticisms arise in any discussion of expanding the international community's responsibility to protect the rights of citizens: First, is it realistic?²⁹⁶ Second, will it serve as a pretext for war?²⁹⁷ In the case of freedom of expression, there is some question whether states will be able to summon the political will to use military force in another country in order to prevent the closing off of certain avenues of expression. Furthermore, because the freedom of expression is a somewhat amorphous concept, its violation may provide an excuse for states interested in intervening in another country for ulterior motives. This Part will address these two concerns.

A. Enforcement of the Responsibility to Protect Free Speech

Expanding the concept of the responsibility to protect to include the right to free speech entails some difficult questions. One

of these questions is whether it is politically feasible or desirable. After all, closing down newspapers and preventing public speeches are crimes that pale in comparison to the crimes of genocide, ethnic cleansing, and crimes against humanity. More importantly, the use of force to *308 prevent such violations of international law seems grossly disproportionate: troops marching into a country to restore free speech could, in certain circumstances, appear quite incongruous. Furthermore, states might struggle to summon the political will necessary to send in such troops. A seminal question thus arises: Would an expanded view of the responsibility to protect be enforceable in a politically acceptable way? There are at least three primary reasons why such a view of the responsibility to protect is enforceable.

First, the idea that widespread violations of the freedom of speech are outlawed under international law is not radical at all but rather a fundamental precept of customary law. According to the Restatement of Foreign Relations Law of the United States, "A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . (g) a consistent pattern of gross violations of internationally recognized human rights."²⁹⁸ The numerous human rights treaties of the postwar period, including the Universal Declaration of Human Rights and the ICCPR, clearly establish the right to free speech as an internationally recognized human right.²⁹⁹ The jump from recognizing a fundamental right to protecting it is a small one indeed. The UN itself has recognized that victims of gross violations of international human rights law must have a remedy for such violations.³⁰⁰

Second, the responsibility to protect is not just about the use of force: it is about an obligation on the part of the international community to protect certain rights.³⁰¹ This obligation includes, but is not limited to, the use of force.³⁰² Indeed, the ramifications of the responsibility to protect, even in its traditional, non-expansive form, are far-reaching. For example, if the international community has a responsibility to protect citizens from certain violations of their rights, then perhaps individual countries have an affirmative *309 obligation to vote in certain ways in the Security Council. Thus, a veto by one of the five permanent members of measures aimed at protecting citizens might be considered an invalid veto from the point of view of international law.³⁰³ Ignoring the veto of a permanent member might be politically implausible, but the legal status of an invalid veto could conceivably affect the legitimacy of acting outside the ambit of the Security Council. Similarly, states might have an obligation, rather than just a right, to criticize countries for their violations of free speech.

Third, the responsibility to protect already incorporates precautionary principles that prevent the kinds of abuses that some commentators worry about. The International Commission proposed that any intervention use "proportional means" or, in other words, that the "scale, duration and intensity of the . . . intervention should be the minimum necessary to secure the defined human protection objective."³⁰⁴ The international community, in considering any intervention, would have to weigh the proportionality of the response to the severity of the violation of international law. Intervention may come in many forms, as mentioned above. It need not only--or even primarily--involve the use of military force. The prevalence of the internet today opens new pathways for communicating with wide audiences. Radio and television broadcasts are still effective tools of message diffusion, as seen to terrible consequences in Rwanda. At least one commentator has argued that international law should sanction the jamming of radio frequencies to prevent dissemination of incitements to genocide.³⁰⁵ Alternatively, countries could transmit "counterbroadcasts" to communicate messages that have been suppressed.³⁰⁶

But all of these questions raise a larger point about the definition of the freedom of expression. As the importance of free speech increases in the modern world, the simple language of human rights treaties on what free speech includes will no longer suffice. The international community must engage in a broader discussion about how to conceive the freedom of expression in international law. Much time has already been spent arguing over the status of hate *310 speech in international law.³⁰⁷ But if the freedom of expression is to be taken seriously as a norm of international law, its contours must be sketched out more fully. Does the international community have an affirmative obligation to provide methods of communication to foreign citizens? Must it restrict the speech of some in order to empower the speech of others? What kinds of interventions are needed to strengthen the freedom of expression? These are not easy questions, but they must be addressed if the international community is to truly fulfill the promise of human rights for all.

B. The Responsibility to Protect as a Pretext for War

Perhaps the greatest worry that scholars and countries have expressed concerning the concept of a responsibility to protect is that it could be used as a pretext for war.³⁰⁸ Critics of a responsibility to protect in particular and humanitarian intervention in general point out that aggressors rarely explain wars as solely self-interested ones.³⁰⁹ Instead, the initiators of war generally couch their positions in the language of self-defense or morality.³¹⁰ History contains many such incidents. For example, in 1815, Prince Metternich of Austria formed a "Holy Alliance" to restore the balance of power in Europe *311 after the Napoleonic Wars and to protect the current regimes against revolution.³¹¹ However, in justifying the alliance, he said that the

"Holy Alliance was not an institution for the suppression of the rights of nations."³¹² It "was solely an emanation of the pietistic feelings of the Emperor Alexander and the application of the principles of Christianity to politics."³¹³

Any acceptance of a right--or even a duty--to intervene in the internal affairs of a state will thus give even greater room for states to engage in war, because they will have firm legal backing for their position. Oscar Schacter, an international law scholar, argues that "it is highly undesirable to have a new rule allowing humanitarian intervention, for that could provide a pretext for abusive intervention."³¹⁴ He concludes that "it is better to acquiesce in a violation . . . than to adopt a principle that would open a wide gap in the barrier against unilateral use of force."³¹⁵

According to this line of thought, then, the expansion of the controversial responsibility to protect doctrine to include freedom of expression will only increase the potential that states will use the doctrine as a pretext for war. They need only cite some violation of individuals' freedom of expression to justify a war. In the eyes of such critics, the better approach would be to cabin the discretion of countries to intervene.³¹⁶ If a responsibility to protect must be accepted in international law, the argument goes, it should be narrowly limited to a few exceptionally egregious violations of human rights: genocide, ethnic cleansing, and crimes against humanity.

The response to this critique of an expansive version of the responsibility to protect is twofold. First, the responsibility to protect already has well-defined limits. Its application should never be unilateral. The relevant UN documents make clear that the use of force should be authorized by the Security Council.³¹⁷ The responsibility to intervene only applies when the individual state is unable or unwilling to protect its citizens from violations of their rights.³¹⁸ Intervention should be proportionate, meaning that the ^{*312} least harmful means of stopping the violation should be adopted, preferably through nonviolent methods.

Furthermore, the development of a broader and more consistent notion of the responsibility to protect may actually decrease the occurrence of wars with ulterior motives. Using social science and political science research, Ryan Goodman has described the process by which law and legitimacy regulate state behavior.³¹⁹ According to his model, "encouraging aggressive states to justify using force as an exercise of humanitarian intervention can facilitate conditions for peace between those states and their prospective targets."³²⁰ Forcing governments to cast their justifications for the use of force as protection of human rights, including free speech, will thus alter domestic situations in the intervening state and lead to less war. Legal, moral, and utilitarian approaches can hardly argue with this result.

VIII. Conclusion

This Article has attempted to demonstrate the importance of expanding the responsibility to protect to include freedom of expression. In other words, the international community has an obligation to intervene in a country where the state is violating the free speech rights of its own citizens. Currently, however, the UN has interpreted the "responsibility to protect" as arising only in cases of genocide, ethnic cleansing, or other large-scale loss of life. As this Article has argued, this interpretation is clearly inconsistent with the expectations created by the numerous post-World War II human rights treaties, which guarantee to all people a wide panoply of individual rights. Furthermore, the arguments justifying an international obligation to intervene in the case of genocide are just as valid, if not more, when applied to an obligation to intervene in the case of widespread violations of free expression. In order to close this gap in international law, the international community should adopt a broader concept of the responsibility to protect--one that includes protection of the right to free speech.

Footnotes

a1 Special thanks to Ryan Goodman, Rachel Brewster, and Richard Parker for their encouragement and assistance.

1 See Fredrick Edwin Smith, *International Law* 28 (BiblioLife 2009) (1906) ("States and states alone enjoy a locus standi in the law of nations: they are the only wearers of international personality.").

2 Sheila McLean, *The Right to Reproduce*, in *Human Rights: From Rhetoric to Reality* 99, 111 (Tom Campbell et al. eds., 1986).

3 Id.

- 4 See, e.g., International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].
- 5 U.N. Charter art. 2, para. 7.
- 6 See *infra* text accompanying notes 74-75 (discussing the view that currently international law does not permit intervention in any matter that is considered an internal matter of a state).
- 7 See Dan Sarooshi, The Security Council's Authorization of Regional Arrangements to Use Force: The Case of NATO, in *The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945* 226, 242-44 (Vaughan Lowe et al. eds., 2008) (outlining historical discussions of the legality of the NATO campaign in Kosovo).
- 8 See generally Int'l Comm'n on Intervention and State Sovereignty, *The Responsibility to Protect* 11-16 (2001) (discussing the development of the doctrine of the responsibility to protect under international law).
- 9 *Id.* at XI.
- 10 See *id.* at 31 (discussing the use of force as an extreme resort).
- 11 Jack Mahoney, *The Challenge of Human Rights: Origin, Development, and Significance* 42-53 (2007).
- 12 See Smith, *supra* note 1, at 28.
- 13 See McLean, *supra* note 2, at 111 ("The [Nazis'] large-scale abuse of noncombatants which characterized [World War II] made discussion of human rights in general more urgent and more meaningful.").
- 14 See *infra* Part IV (discussing state sovereignty and free speech).
- 15 *Id.*
- 16 See *infra* text accompanying notes 204-205 (discussing the invocation of non-intervention by certain states when they were criticized for suppression of free speech by the international community).
- 17 See *infra* Part IV (discussing the erosion of the theory that states have absolute control over their own internal affairs in favor of a recognition that states owe their citizens certain basic obligations).
- 18 See Jeffrey L. Dunoff, Stephen R. Ratner & David Wippman, *International Law: Norms, Actors, Process: A Problem-Oriented Approach* 111 (2d ed. 2006) ("Orthodox international law doctrine has regarded states as the primary, or even sole, actors in international law...since only] they could create and be the direct subject of international legal obligations.").
- 19 See McLean, *supra* note 2, at 111.

- 20 But see Mats Berdal, *The Security Council and Peacekeeping*, in *The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945*, supra note 7, at 175, 191-93 (noting the poor record of UN peacekeeping missions in the 1990s, but citing different reasons for those operational failures, including the large increase in volume and complexity of UN field operations, and the occasional tensions and conflicts among UN member countries, especially the P5).
- 21 Int'l Comm'n on Intervention and State Sovereignty, supra note 8, at 11-16 (discussing the development of the doctrine of the responsibility to protect under international law).
- 22 Smith, supra note 1, at 28.
- 23 See Werner Levi, *Contemporary International Law* 10 (2d ed. 1991) (explaining that early writers on international law focused primarily on topics of just wars and the rules for conducting them, the laws of treaties, extraterritoriality, and the theoretical foundations of international law).
- 24 2 Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* [On the Law of War and Peace: Three Books] 599, 602, 629 (Francis W. Kelsey et al. trans., Clarendon Press 1925) (1625) (asserting (1) that what is permissible in war arises, in part, from the law of nature; (2) that a warring state does not possess the right to interfere with trade in goods not useful in war; and (3) the extraterritoriality of ambassadors).
- 25 In 1924, the Permanent Court of International Justice stated,
It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right...to ensure, in the person of its subjects, respect for the rules of international law. *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30).
- 26 See Inis L. Claude, Jr., *National Minorities: An International Problem* 16-30 (Greenwood Press 1969) (describing the system of protecting minority groups under the League of Nations).
- 27 See David Wippman, *The Evolution and Implementation of Minority Rights*, 66 *Fordham L. Rev.* 597, 599-600 (1997) (stating that in the aftermath of WWI, the claims of national groups concerning the rights of minorities "dominated the international legal agenda").
- 28 Woodrow Wilson's Fourteen Points are reprinted in Margaret MacMillan, *Paris 1919: Six Months That Changed the World* 495-96 (2001). He described the concept of self-determination more thoroughly in a speech at Billings, Montana in 1919:
'The fundamental principle of [self-determination] is a principle never acknowledged before, a principle which had its birth and has had its growth in this country: that the countries of the world belong to the people who live in them, and that they have a right to determine their own destiny and their own form of government and their own form of policy, and that no body of statesmen, sitting anywhere, no matter whether they represent the overwhelming physical force of the world or not, has the right to assign any great people to a sovereignty under which it does not care to live.'
Wilson's Ideals 109 (Saul K. Padover ed., 1942) (quoting President Woodrow Wilson, Speech at Billings, Montana (Sept. 11, 1919)). For a good description of the development of the idea of self-determination, see Antonio Cassese, *Self-Determination of Peoples* 11-33 (1995).
- 29 Claude, supra note 26, at 13-14; Wippman, supra note 27, at 599-600.
- 30 Claude, supra note 26, at 13-15.

- 31 See, e.g., *Minority Schools in Albania*, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 62, at 17 (April 6) (noting that one purpose of the treaty was to “ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions, their national characteristics”); U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Study of the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, P 100, U.N. Doc. E/CN.4/Sub.2/384/REV.1 (1979) (prepared by Francesco Capotorti) (“[P]rovision was made for special measures deriving from the idea of safeguarding the values peculiar to each minority group, namely, language, religion and culture.”).
- 32 For a history of the International Labour Organization, see Carlos R. Carrion Crespo, [When Labor Law Went Global: The Road to the International Labor Organization](#), 37 *Rev. Jur. U.I.P.R.* 129, 142-47 (2002).
- 33 Paul Sieghart, *The International Law of Human Rights* 14 (2003).
- 34 *Id.*
- 35 See McLean, *supra* note 2, at 111 (stating that in response to the Nazi atrocities, the U.N. “promulgated a number of agreements protecting the sanctity of the individual, and states and courts began to review their policies in light of changing world opinion”).
- 36 See *id.*
- 37 See Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* 11 (2006) (discussing the evolution of State responsibility including responsibility for wrongful conduct against non-nationals).
- 38 See Charter of the International Military Tribunal art. 1, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (establishing an International Military Tribunal for the “trial and punishment of the major war criminals of the European Axis”).
- 39 See *id.* art. 6 (listing the offenses to be tried by the International Military Tribunal).
- 40 See Claude, *supra* note 26, at 163 (describing failed proposals before the U.N. General Assembly for a multilateral convention toward establishing minority rights following World War II).
- 41 *Id.*
- 42 Dunoff, Ratner & Wippman, *supra* note 18, at 443.
- 43 Inter-American Conference on Problems of War and Peace, Mexico city, February 21-March 8, 1945 (1945), reprinted in *The International Conferences of American States 1942-1954* 51, 51 (Pan American Union ed., 2d Supp. 1958).
- 44 U.N. Charter pmbl.
- 45 *Id.* art. 55(c).
- 46 *Id.* art. 56.

- 47 Id. art. 68.
- 48 President Harry Truman, Address at the United Nations Conference on International Organization Final Plenary Session (June 26, 1945), in Dep't St. Bull., July 1945, at 5.
- 49 See McLean, *supra* note 2, at 111; Paul Sieghart, *supra* note 33, at 14-15 (describing the influx of intergovernmental organizations and treaties "specifically concerned with the relations between governments and their own subjects"); Louis B. Sohn & Thomas Buergenthal, *International Protection of Human Rights* 505-35 (1973) (discussing the U.N. and human rights); Anthony A. D'Amato, *The Concept of Human Rights in International Law*, 82 Colum. L. Rev. 1110, 1128 (1982) (referencing the many resolutions of the U.N. General Assembly that have been passed in the years following the creation of the U.N. Charter toward the advancement of aspirations defined in Article 56 of the Charter); Louis Henkin, *The International Human Rights Treaties: Some Problems of Policy and Interpretation*, 126 U. Pa. L. Rev. 886, 886-88 (1978) (describing the Carter administration's reliance on treaties as a means toward promoting human rights in the international sphere).
- 50 ECOSOC Res. 5 (I), P 1, U.N. Doc. E/20 (Feb. 15, 1946) (creating the Human Rights Commission).
- 51 Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 A (III), U.N. GAOR, 3d Sess., 179th plen. mtg., U.N. Doc. A/RES/3/260 (Dec. 9, 1948).
- 52 UDHR, *supra* note 4.
- 53 Other important treaties protecting individual human rights include: the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85; the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; the Final Act of the Conference on Security and Co-operation in Europe, Aug. 1, 1975, 14 I.L.M. 1292; the International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243; ICCPR, *supra* note 4; the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195; Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), 15th Sess., 947th plen. mtg., U.N. Doc. A/RES/15/1514 (Dec. 14, 1960); the Convention on the Political Rights of Women, Dec. 20, 1952, 193 U.N.T.S. 135; and the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.
- 54 See, e.g., ICCPR, *supra* note 4, art. 19 ("Everyone shall have the right to freedom of expression"); International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 53, art. 2(1) ("States Parties...undertake to pursue...a policy of eliminating racial discrimination in all its forms"); UDHR, *supra* note 4, art. 18 ("Everyone has the right to freedom of thought, conscience and religion....").
- 55 For a discussion of the socializing effect of international human rights law, see Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 Duke L.J. 621 (2004).
- 56 See *infra* text accompanying note 61 (describing the very limited means that individuals had to pursue their rights, despite the relatively broad scope of those rights).
- 57 See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 53, arts. 2, 4 (imposing obligations on state signatories, but providing no avenue for individuals to vindicate the rights the Convention affords).
- 58 This tenet of international law was codified in the Vienna Convention on the Law of Treaties. According to Article 34 of that document, "[a] treaty does not create either obligations or rights for a third State without its consent." Vienna Convention on the

Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 321.

- 59 See, e.g., Joe Stork, Human Rights and U.S. Policy, Foreign Pol'y in Focus, Mar. 31, 1999, http://www.fpif.org/reports/human_rights_and_us_policy (discussing the many treaties that Washington has failed to ratify and the implications of those failures to ratify).
- 60 See id. (noting that the U.S. did not ratify the ICCPR until 1992).
- 61 Levi, *supra* note 23, at 181.
- 62 Optional Protocol to the International Covenant on Civil and Political Rights arts. 1-5, Dec. 16, 1966, 999 U.N.T.S. 302; U.N. Human Rights Comm., Introduction to Selected Decisions Under the Optional Protocol (Second to Sixteenth Sessions), P 3, U.N. Doc. CCPR/C/OP/1 (1985).
- 63 See Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 53, art. 17 (establishing the Committee on the Elimination of Discrimination against Women to monitor the progress made in implementing the convention).
- 64 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Oct. 6, 1999, 2131 U.N.T.S. 83. For a discussion of the importance of the Optional Protocol, see Felipe Gomez Isa, The [Optional Protocol for the Convention on the Elimination of All Forms of Discrimination Against Women: Strengthening the Protection Mechanisms of Women's Human Rights](#), 20 *Ariz. J. Int'l & Comp. L.* 291 (2003).
- 65 See McLean, *supra* note 2, at 111.
- 66 See generally Nicholas J. Wheeler, Saving Strangers: Humanitarian Intervention in International Society 172-284 (2000) (discussing humanitarian intervention in the various cases of Somalia, Rwanda, Bosnia and Kosovo). But see Berdal, *supra* note 20, at 191-93 (noting the poor record of U.N. peacekeeping missions in the 1990s).
- 67 International Coalition for the Responsibility to Protect, [http:// www.responsibilitytoprotect.org](http://www.responsibilitytoprotect.org) (last visited Mar. 8, 2010) ("The responsibility to protect is a new international security and human rights norm to address the international community's failure to prevent and stop genocides, war crimes, ethnic cleansing and crimes against humanity.").
- 68 U.N. Charter art. 2, para. 7. For an in-depth discussion of the meaning of Article 2(7), see Kristen Walker, An [Exploration of Article 2\(7\) of the United Nations Charter as an Embodiment of the Public/Private Distinction in International Law](#), 26 *N.Y.U. J. Int'l L. & Pol.* 173 (1994).
- 69 Ian Brownlie, *Principles of Public International Law* 284 (7th ed. 2008). See also Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), pmbl., U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8082 (Oct. 24, 1970) (noting that customary norms prevent states from interfering in the domestic affairs of other states); *Island of Palmas (Neth. v. U.S.)*, 2 *R. Int'l Arb. Awards* 829, 838 (Apr. 4, 1928) (explaining that the "principle of the exclusive competence of the State in regard to its own territory [has developed] in such a way as to make it the point of departure in settling most questions that concern international relations"); M.S. Rajan, *United Nations and Domestic Jurisdiction* 5-6 (2d ed. 1961) (discussing sovereignty, including the right of the state to regulate its own domestic affairs, and stating that "the recognition of the independence of states is a fundamental rule of international law").
- 70 U.N. Charter art. 1, para 3.

- 71 Id. art. 2, para. 4. See also Hans Köchler, *The Concept of Humanitarian Intervention in the Context of Modern Power Politics* 18 (2001) (noting that this principle was incorporated into article 2(4) of the United Nations Charter).
- 72 See Charter of the International Military Tribunal, *supra* note 38, art. 1.
- 73 Id. art. 6(c).
- 74 U.N. Charter art. 103 (“In the event of a conflict between the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”).
- 75 Köchler, *supra* note 71, at 19.
- 76 U.N. Charter art. 42. For a discussion of the use of force under the U.N. Charter, see Thomas Franck, *Who Killed Article 2(4)?: Changing Norms Governing the Use of Force by States*, 64 *Am. J. Int’l L.* 809 (1970); *The United Nations Charter and the Use of Force: Is Article 2(4) Still Workable?*, 78 *Amer. Soc. Int’l L. Proc.* 68 (1984).
- 77 It is not entirely accurate to say that the U.N. Charter bans the use of force. Article 51 preserves the right of states to defend against an armed attack. U.N. Charter art. 51.
Nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.
Id.
- 78 See J.P.D. Dunbabin, *The Security Council in the Wings: Exploring the Security Council’s Non-involvement in Wars*, in *The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945*, *supra* note 7, at 494, 494-503 (exploring several reasons for the generally inactive Security Council during the Cold War, including the American-Soviet rivalry, the over-use of the Security Council veto, and the U.N.’s lack of resources); see generally Andrew Boyd, *Fifteen Men on a Powder Keg: A History of the UN Security Council* (1971) (discussing the history of the U.N. Security Council, including successes and failures).
- 79 See Dunbabin, *supra* note 78, at 494-503.
- 80 See Rajan Menon, *Pious Words, Puny Deeds: The “International Community” and Mass Atrocities*, 23.3 *Ethics & Int’l Aff.* 235, 239 (2009) (“Despite his oft-repeated commitment to human rights, President Carter took a hands-off position while the Khmer Rouge methodically killed over a quarter of Cambodia’s population between 1975 and 1978.”).
- 81 Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 *Wis. Int’l L.J.* 703, 705 (2006).
- 82 In a 1991 speech to Congress, George H.W. Bush said:
Now, we can see a new world coming into view. A world in which there is the very real prospect of a new world order. In the words of Winston Churchill, a ‘world order’ in which ‘the principles of justice and fair play ... protect the weak against the strong’ A world where the United Nations, freed from cold war stalemate, is poised to fulfill the historic vision of its founders. A world in which freedom and respect for human rights find a home among all nations.
President George H.W. Bush, *Address to the U.S. Congress After the Gulf War* (Mar. 6, 1991); see also David M. Malone, *The International Struggle Over Iraq 67-68*, 211-12 (2006) (discussing Bush’s remarks and the changed view of the world that they reflected).

- 83 See generally Malone, *supra* note 82, at 54-78 (providing a historical account of the Gulf War).
- 84 See generally Rupert Smith, *The Security Council and the Bosnian Conflict: A Practitioners View*, in *The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945*, *supra* note 7, at 442, 442-51 (describing the U.N.'s involvement in the 1990s conflict in the Balkans); Susan L. Woodward, *The Security Council and the Wars in the Former Yugoslavia*, in *The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945*, *supra* note 7, at 406, 406-41 (describing the U.N.'s response to the break-up of the former Yugoslavia, and commenting that the U.N.'s involvement in the conflict "tarnished [its] reputation ... so deeply that many feared it might not recover").
- 85 Estevao Gomes Pinto de Abreu, *United Nations and the Use of Force in Peace Operations: Agenda for Peace Enforcement?*, Presentation to the Organizing Committee of the Joint International Conference ISA-ABRI 2009 2 (July 22, 2009), http://www.allacademic.com/meta/p_mla_apa_research_citation/3/8/1/0/7/pages381070/p381070-4.php.
- 86 Press Release, Security Council, *Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia*, U.N. Doc SC/6659 (Mar. 26, 1999).
- 87 For a discussion of the legality of the Kosovo intervention, see generally David Chandler, *From Kosovo to Kabul: Human Rights and International Intervention* 120-157 (2002) (discussing the challenge of using international law to deal with human rights issues in situations like Kosovo); Anne-Sophie Massa, *NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion?*, 24 *Berkeley J. Int'l L.* 610, 618-26 (2006) (arguing that the intervention may have been illegal and, furthermore, that NATO may have committed war crimes in the course of intervening); Nigel S. Rodley & Basak Cali, *Kosovo Revisited: Humanitarian Intervention on the Fault Lines of International Law*, 7 *Hum. Rts. L. Rev.* 275, 279-82 (2007) (reviewing various lines of reasoning that could be used to classify the intervention as legal or illegal); Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, 93 *Am. J. Int'l L.* 828, 828-31 (1999) (arguing that there was a "lack of any simple [legal] principle for the air campaign").
- 88 See, e.g., Rodley & Cali, *supra* note 87, at 279-83 (reviewing the arguments on both sides as to the legality of the NATO intervention).
- 89 Dunoff, Ratner & Wippman, *supra* note 18, at 940.
- 90 The Independent International Commission concluded that the bombing campaign was "illegal but legitimate." Int'l Indep. Comm'n on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* 4 (2000). See Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 *Am. J. Int'l L.* 834, 834 (1999) ("Indisputably, the NATO intervention ... violated the United Nations Charter and international law."). For a more nuanced view of the illegality of the intervention, see generally Antonio Cassese, *A Follow-Up: Forcible Humanitarian Countermeasures and Opinio Necessitatis*, 10 *Eur. J. Int'l L.* 791, 792-93 (1999) (noting that even though very few states have recognized the legality of the intervention, many have recognized that it was morally and politically necessary); Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 *Eur. J. Int'l L.* 23, 23-24 (1999) [hereinafter Cassese, *Ex Iniuria Ius Oritur*] (arguing that the intervention was contrary to international law but nevertheless necessary from a moral point of view); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 *Eur. J. Int'l L.* 1, 1-4 (1999) (noting that "only a thin red line separates NATO's action from international legality").
- 91 *Legality of Use of Force (Yugo. v. U.S.)* (Application Instituting Proceedings) (filed Apr. 29, 1999), available at <http://www.icj-cij.org/docket/files/114/7173.pdf> (last visited Mar. 8, 2010).
- 92 *Legality of Use of Force (Yugo. v. Belg.)*, 1999 I.C.J. Pleadings 14 (May 10, 1999), reprinted in 1986 *Brit. Y. B. Int'l L.* 614, 619.

93 Id.

94 James P. Rubin, U.S. Dep't of State, Daily Press Briefing (Mar. 16, 1999), available at <http://www.hri.org/news/usa/std/1999/99-03-16.std.html>.

95 Int'l Indep. Comm'n on Kosovo, *supra* note 90, at 4.

96 Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 Am. J. Int'l L. 847, 852 (1999).

97 The Secretary-General, Millennium Report of the Secretary-General, *We the People: The Role of the United Nations in the 21st Century*, at 48, U.N. Doc A/54/20 (2000), available at <http://www.un.org/millennium/sg/report/ch3.pdf>.

98 Kofi Annan, *Two Concepts of Sovereignty*, *Economist*, Sept. 18, 1999, at 49, 49.

99 See ICISS, *The Responsibility to Protect*, <http://www.iciss.ca/menu-en.asp> (last visited Mar. 8, 2010) ("The independent International Commission on Intervention and State Sovereignty was established by the Government of Canada in September 2000....").

100 See Dunoff, Ratner & Wippman, *supra* note 18, at 955.

101 Int'l Comm'n on Intervention and State Sovereignty, *supra* note 8, at VIII.

102 Id. at XII.

103 Id.

104 Id.

105 Id. at XI.

106 See id. at 12 ("[T]he authority of the state is not regarded as absolute, but constrained and regulated internally by constitutional power sharing arrangements.").

107 The Secretary-General, *Report of the Security-General's High-level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, PP2-3, delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 2, 2004), available at <http://www.un.org/secureworld/report2.pdf>.

108 Id. P 203.

109 Id. P 207.

- 110 The document states:
Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.... In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.
G.A. Res. 60/1, PP 138-39, U.N. Doc. A/Res/60/1 (Oct. 24, 2005).
- 111 S.C. Res. 1674, P 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).
- 112 See G.A. Res. 60/1, *supra* note 110, PP 138-39 (pulling back from the stated standard).
- 113 Mahoney, *supra* note 11, at 42-53.
- 114 UDHR, *supra* note 4, arts. 7, 13.
- 115 Louis Henkin, *Human Rights and State "Sovereignty,"* 25 Ga. J. Int'l & Comp. L. 31, 40 (1995).
- 116 Int'l Comm'n on Intervention and State Sovereignty, *supra* note 8, at 1-2; see also Ved P. Nanda, *Tragedies In Somalia, Yugoslavia, Haiti, Rwanda and Liberia-Revisiting the Validity of Humanitarian Intervention Under International Law* (pt. 2), 26 *Denv. J. Int'l L & Pol'y* 827, 830 n.15 (1998) (noting the United States' reaction following the crises).
- 117 See generally Int'l Comm'n on Intervention and State Sovereignty, *supra* note 8, at XI-XIII (outlining the tenets and duties of the new intervention doctrine).
- 118 See, e.g., Roger Cohen, *The Making of an Iran Policy*, N.Y. Times, July 30, 2009, <http://www.nytimes.com/2009/08/02/magazine/02Iran-t.html> (noting the Obama administration's decision not to intervene in the post-election government crackdown); Nicholas Kristof, *Sneaking in Where Thugs Rule*, N.Y. Times, Feb. 4, 2009, <http://www.nytimes.com/2009/02/05/opinion/05kristof.html> (detailing unchecked human rights abuses in Myanmar); Edward Wong, *China Rebuffs Clinton on Internet Warning*, N.Y. Times, Jan. 22, 2010, <http://www.nytimes.com/2010/01/23/world/asia/23diplo.html> (commenting on one form of China's free speech abuses).
- 119 Robert Hargreaves, *The First Freedom: A History of Free Speech* 4-9 (2002) (describing the free speech enjoyed by Athenians at this time).
- 120 Euripides, *The Suppliants* (11.438-441), translated in John Milton, *Aeropagitica* (1644), reprinted in *The Oxford Authors: John Milton* 236, 237 (Stephen Orgel & Jonathan Goldberg eds., 1991).
- 121 In the seventh century, the caliph Omar pronounced, "Only decide on the basis of proof, be kind to the weak so that they can express themselves freely and without fear, deal on an equal footing with litigants by trying to reconcile them." Marcel A. Broisard, *On the Probable Influence of Islam on Western Public and International Law*, 11 *Int'l J. Middle East Stud.* 429, 440 (1980).
- 122 So, in 1516, Erasmus, in his *Education of a Christian Prince*, says, "In a free state, tongues too should be free." Desiderius Erasmus, *The Education of a Christian Prince* 232 (Lisa Jardine ed., Cambridge Univ. Press 1997) (1516). Likewise, John Milton, in his famous tract, *Areopagitica*, argued against restrictions on the press. John Milton, *supra* note 120, at 237-73.

- 123 The French document, The Declaration of the Rights of Man, was the first document positing that all individuals possessed a right to freedom of expression. In 1689, the English Bill of Rights, adopted after William and Mary overthrew James II, contained provisions granting freedom of speech in Parliament. Official Website of the British Monarchy, History of the Monarchy: The Stuarts--Mary II and William III, <http://www.royal.gov.uk/HistoryoftheMonarchy/KingsandQueensoftheUnitedKingdom/TheStuarts/MaryIIWilliamIIIandTheActofSettlement/MaryIIWilliamIII.aspx> (last visited Mar. 8, 2010).
- 124 1789 Declaration des droits de l'Homme et du citoyen [Declaration of the Rights of Man and of the Citizen] art. 11. The Declaration is incorporated into France's current constitution. 1958 Const. pmbl. (Fr.).
- 125 U.S. Const. amend. I.
- 126 See Ronald J. Krotoszynski, Jr., The First Amendment in Cross-Cultural Perspective: A Comparative Analysis of the Freedom of Speech, at xiv (2006) ("Virtually all constitutional democracies purport to respect the freedom of speech..."); see also Elizabeth F. Defeis, [Freedom of Speech and International Norms: A Response to Hate Speech](#), 29 Stan. J. Int'l L. 57, 57 (1992) (stating that freedom of speech "is recognized throughout the world as an essential component of a just society").
- 127 See, e.g., UDHR, supra note 4, pmbl.
- 128 Dunoff, Ratner & Wippman, supra note 18, at 446.
- 129 Id.; see also Vratislav Pechota, The Development of the Covenant on Civil and Political Rights, in The International Bill of Rights 32, 32-33 (Louis Henkin ed., 1981) (discussing the buckpassing of the U.N. Charter to subsequent enforceable arrangements).
- 130 UDHR, supra note 4.
- 131 Id. pmbl., art 1.
- 132 Id. art. 19.
- 133 Id. art. 29.
- 134 Saudi Arabia protested against the articles in the Declaration declaring equal marriage rights and the right to change one's religion or beliefs. Dunoff, Ratner & Wippman, supra note 18, at 447.
- 135 The Secretary General, United Nations Action in the Field of Human Rights, P 67, U.N. Doc. ST/HR/2/Rev.2 (1983) ("[The Universal Declaration] is, as its title implies, truly universal in its application and applies to every member of the human family, everywhere, regardless of whether or not his Government accepts its principles or ratifies the Covenants....")
- 136 Louis B. Sohn, The Universal Declaration of Human Rights, 8 J. Int'l Commission Jurists 17, 26 (1967).
- 137 Countries such as Algeria, the Ivory Coast, Madagascar, and Cameroon have incorporated substantial parts of the Declaration. James Avery Joyce, Human Rights: International Documents 146 (1978).

- 138 Most Caribbean countries base their constitutional instruments on the UDHR. Stephen Vasciannie, *Human Rights in the Caribbean: Notes on Perception and Reality*, in *The Caribbean Integration Process: A People Centered Approach* 167, 168 (Kenneth Hall ed., 2007).
- 139 ICCPR, *supra* note 4, art. 41.
- 140 *Id.* art. 19.
- 141 *Id.*
- 142 *Id.* art. 19, para. 2.
- 143 *Id.* art. 19, para. 3.
- 144 *Id.*
- 145 See Defeis, *supra* note 126, at 79 (noting the dually restrictive outcome of the speech limitation debate).
- 146 See Marc J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* 379 (1987) (noting debate over the proposal).
- 147 *Id.* at 393. Some states even argued for limitations on expressions that are obscene and expressions that defame the reputations of others. These limitations were not included in the final draft. *Id.* at 387.
- 148 *Id.* at 386.
- 149 *Id.* at 386-87.
- 150 Today, 162 countries have ratified the convention. The Office of the High Commissioner for Human Rights keeps a full list of parties to the ICCPR. United Nations Treaty Collection, *International Covenant of Civil and Political Rights*, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Mar. 8, 2010).
- 151 Defeis, *supra* note 126, at 94.
- 152 Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, para. 2, Nov. 4, 1950, 213 U.N.T.S. 22 [hereinafter *European Convention*].
- 153 *Id.* art.19.
- 154 All twenty-two members of the Council of Europe have adopted the optional protocol. See Mark W. Janis & Richard S. Kay, *European Human Rights Law* 22-32 (1990) (providing a history of formation of the protocol).

- 155 Compare European Convention, *supra* note 152, art. 10 (“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”) with ICCPR, *supra* note 4, art. 19
1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
- 156 European Convention, *supra* note 152, art. 10.
- 157 See Defeis, *supra* note 126, at 94 (noting a policymaking stalemate).
- 158 See *id.* (noting the immediate backdrop of the human rights abuses of WWII).
- 159 A huge literature exists on the conflict between United States free speech law and free speech law in the rest of the world. For comparative commentary on various bodies of speech law, see *id.* (discussing the impact of international norms on hate speech); Claudia E. Haupt, [Regulating Hate Speech--Damned if You Do and Damned if You Don't: Lessons Learned from Comparing the German and U.S. Approaches](#), 23 B.U. Int'l L. J. 299 (2005) (providing a comparison of U.S. and German approaches to free speech protections); Krotoszynski, *supra* note 126 (comparing speech law); Ziyad Motala, [The First Amendment and Hate Speech: An Illustration of Why the United States Supreme Court's Approach Represents an Anomaly](#), 46 How. L.J. 507 (2003) (discussing the U.S. approach to hate speech and how it represents an anomaly in the international community); Robert A. Sedler, [An Essay on Freedom of Speech: The United States Versus the Rest of the World](#), 2006 Mich. St. L. Rev. 377 (2006) (reviewing U.S. free speech protections and comparing them with those found in the rest of the world).
- 160 Organization of American States [Charter](#), Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, [hereinafter OAS Charter].
- 161 Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1114 U.N.T.S. 123 [hereinafter American Convention].
- 162 *Id.*
- 163 Thomas Buergenthal, The Inter-American System for Protection of Human Rights, in Human Rights in International law: Legal Policy Issues 439, 460-67 (Theodore Meron ed., 1984); Thomas Buergenthal, Human Rights in the Americas: View From the Inter-American Court, 2 Conn J. Int'l L. 303, 306-09 (1987).
- 164 Compare American Convention, *supra* note 161, art. 13 (“Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.”) with ICCPR, *supra* note 4, art. 19 (“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”).
- 165 American Convention, *supra* note 161, art. 13, para. 1.
- 166 *Id.* art. 13, para. 3.
- 167 *Id.* art. 13, para. 5.

- 168 Notably, the American Convention has several features that go beyond other human rights instruments. For one, the American Convention explicitly states that the exercise of the right of freedom of expression "shall not be subject to prior censorship." See Global Internet Liberty Campaign, *Regardless of Frontiers* (1998), available at <http://gilc.org/speech/report/>. The rule against prior censorship is also reinforced by Article 14, which provides for a right of reply by anyone injured by inaccurate or offensive statements or ideas disseminated to the general public. See *id.*
- 169 Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 & 29 of the American Convention on Human Rights), Adv. Op. OC-5/85, Inter-Am. Ct. H.R. (ser. A), No. 5, P 50 (Nov. 13, 1985), available at http://www1.umn.edu/humanrts/iachr/b_11_4e.htm.
- 170 1985 Inter-Am. Y.B. on Hum. Rts. 1176.
- 171 Ziyad Motala, Human Rights in Africa: A Cultural, Ideological, and Legal Examination, 12 *Hastings Int'l & Comp. L. Rev.* 373, 396 (1989).
- 172 *Id.*; B. Obinna Okere, The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems, 6 *Hum. Rts. Q.* 141,144 (1984).
- 173 Claude E. Welch, Jr., The African Commission on Human and Peoples' Rights: A Five-Year Report and Assessment, 14 *Hum. Rts. Q.* 43, 43 (1992).
- 174 African Charter on Human and Peoples' Rights art. 30, June 27, 1981, 21 *ILM* 58, OAU Doc. CAB/LEG/67/3 rev. 5, entered into force Oct. 21, 1986, 21 *ILM* 58 [hereinafter African Charter].
- 175 *Id.* art. 59.
- 176 Edem Kodjo, The African Charter on Human and Peoples' Rights, 11 *Hum. Rts. L.J.* 271, 279 (1990).
- 177 Burns H. Weston et al., Regional Human Rights Regimes: A Comparison and Appraisal, 20 *Vand. J. Transnt'l L.* 585, 611 (1987).
- 178 Rebecca Wright, Finding an Impetus for Institutional Change at the African Court for Human and Peoples' Rights, 24 *Berkeley J. Int'l Law* 463, 476 (2006).
- 179 See *id.* (showing the development of the court from a rational design theory perspective).
- 180 African Charter, *supra* note 174, art. 9.
- 181 *Id.* art. 27.
- 182 Int'l Ctr. Against Censorship, *The Article 19 Freedom of Expression Handbook: International and Comparative Law, Standards and Procedures* 15 (1993).
- 183 *Id.* at 224-25, 226.

184 Id. at 15.

185 Id.

186 Id.

187 Id. at 15-16.

188 Id. at 16.

189 For example, the European Convention states that it does “not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.” European Convention, *supra* note 152, art. 10.

190 The UDHR, *supra* note 4, art. 29, para. 2, permits restrictions on the freedom of speech to secure “due recognition and respect for the rights and freedoms of others and...the just requirements of morality, public order and the general welfare....” The ICCPR, *supra* note 4, art. 19, para. 3(b), permits restrictions to protect “the rights or reputations of others,” national security, public order, and “public health or morals.” The American Convention, *supra* note 161, art. 13, uses the same language as the ICCPR. The European Convention, *supra* note 152, art. 10, allows restrictions to protect “national security, territorial integrity or public safety,” health, morals, the rights of others, and the impartiality of the judiciary, as well as to prevent disorder or the disclosure of confidential information. The African Charter, *supra* note 174, art. 27, permits restrictions to protect “the rights of others, collective security, morality, and common interest.”

191 Sohn, *supra* note 136, at 26.

192 The experience of Sri Lanka is illustrative. Sri Lanka acceded to the ICCPR in 1980 and the Optional Protocol in 1997. Sri Lanka’s Supreme Court Decision Undermines Human Rights Protection, Refworld, Oct. 17, 2006, <http://www.fidh.org/spip.php?article3731>. But in 2006, the Sri Lankan Supreme Court issued a decision stating that “the [ICCPR] does not have internal effect and the rights under the ICCPR are not rights under the law of Sri Lanka.” *Singarasa v. Attorney General*, [2006] SC (SPL) L.A. No. 182/99, at *7 (Sri Lanka). As for the Optional Protocol, the Court held that its ratification was unconstitutional and thus individuals “cannot seek to ‘vindicate and enforce’ [their] rights through the [Human Rights Committee].” Id. at *6. In a case later that year, when a plaintiff complained that the Supreme Court was the final court of appeals, the Chief Justice jokingly responded, “Well, try the Optional Protocol,” and laughed. Press Release, Asian Human Rights Comm’n, Sri Lanka: The Optional Protocol to the ICCPR is Openly Subjected to Ridicule by Sarath N. Silva, the Chief Justice, (Oct. 12, 2006), available at <http://www.ahrchk.net/pr/mainfile.php/2006mr/398/>.

193 Wright, *supra* note 178, at 476.

194 See Morse H. Tan, [Upholding Human Rights in the Hemisphere: Casting Down Impunity Through the Inter-American Court of Human Rights](#), 43 *Tex. Int’l L.J.* 243, 277-84 (2008) (explaining the referral system and describing the Court’s previous lack of effectiveness).

195 See Oona A. Hathaway, [Do Human Rights Treaties Make a Difference?](#), 111 *Yale L.J.* 1935, 1962-89 (2002) (a quantitative study to determine whether states act in their own self-interest with respect to their attitude on human rights law); Oona A. Hathaway, [Why Do Countries Commit to Human Rights Treaties?](#), 51 *J. Conflict Resol.* 588, 592 (2007) (arguing that “the effect of a treaty on a state--and hence the state’s willingness to commit to it - is largely determined by the domestic enforcement of the treaty and the treaty’s collateral consequences.”).

- 196 OAS Charter, *supra* note 161, art. 15 (“No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131 (XX), P 1, U.N. Doc. A/Res/20/2131 (Dec. 21, 1965) (“No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”).
- 197 See Levi, *supra* note 23, at 181.
- 198 *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 439 (1964).
- 199 *Id.* at 422-23.
- 200 See *id.* at 408-09 (citing cases permitting sovereign states to sue in the courts of the United States).
- 201 See Lynn Hunt, *Inventing Human Rights: A History* (2007); Micheline R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* 173-229 (2004) (tracing the history of human rights); Mahoney, *supra* note 11, at 42-64 (examining the treaties of the modern human rights movement).
- 202 Annan, *supra* note 98, at 49.
- 203 See Emma McClean, *The Responsibility to Protect: The Role of International Human Rights Law*, 13 J. Conflict & Sec. L. 123, 128-29 (2008) (showing Annan’s influential role in the development of humanitarian intervention and the responsibility to protect, ultimately adapted by the United Nations at the 2005 World Summit).
- 204 See Tibet Since 1950: Silence, Prison or Exile 30-175 (Melissa Harris & Sidney Jones eds., 2000) (photo-history of human rights violations in Tibet since 1950); Laura S. Ziemer, [Application in Tibet of the Principles on Human Rights and the Environment](#), 14 *Harv. Hum. Rts. J.* 233, 234-38 (2001) (connecting human rights standards and the environment in Tibet); Amnesty International, *Our Statement to U.N. Human Rights Council regarding Tibet* (Mar. 26, 2008), available at <http://www.amnesty.org.au/news/comments/11342/> (calling on the Human Rights Council to address the human rights situation in the Tibetan Autonomous Region and in the neighboring provinces which have experienced unrest).
- 205 Ministry of Foreign Affairs of the People’s Republic of China, Chinese Foreign Ministry Spokesperson Qin Gang’s Regular Press Conference on March 27, 2008, (Mar. 27, 2008), available at <http://www.fmprc.gov.cn/eng/xwfw/s2510/t419160.htm>.
- 206 A More Secure World: Our Shared Responsibility, *supra* note 107, P 29.
- 207 See Int’l Comm’n on Intervention and State Sovereignty, *supra* note 8, at 12 (an international survey of opinions on the moral, legal, operational, and political questions related to humanitarian intervention); A More Secure World: Our Shared Responsibility, *supra* note 107, PP 183-209 (outlining a system of international collective security); Annan, *supra* note 98, at 49 (arguing for international humanitarian intervention despite state sovereignty).
- 208 Annan, *supra* note 98, at 49.
- 209 *Id.*

- 210 But see Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* 21-44 (2005) (using state interest to explain the realities of international law); John C. Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (2005) (arguing that American presidents have the power to act decisively on the world stage without a declaration of war); Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. Colo. L. Rev. 1089, 1104-07 (1999) (describing a “new” view of American foreign affairs law); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 870-73 (1997) (arguing that customary international law, including human rights law, should not have the status of federal law in the United States). For a discussion of how America’s participation in international institutions is threatened by a vocal group of intellectuals seeking to guard U.S. sovereignty at all costs, see Peter Spiro, *The New Sovereignists: American Exceptionalism and Its False Prophets*, *Foreign Aff.*, Nov.-Dec. 2000, at 9, 9-15.
- 211 See Robert Hargreaves, *The First Freedom: A History of Free Speech* 1-22 (2002) (describing protections of the freedom of speech since the times of the Ancient Greeks).
- 212 See Anne-Marie Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, in *Global Governance and Public Accountability* 35, 35-66 (David Held & Mathias Koenig-Archibugi eds., 2005) (contending that, in the face of globalization, the representatives of sovereign nations must be directly accountable); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 Mich. J. Int. L. 1041, 1066-73 (2003) (arguing that, rather than having a world state, disaggregated nations in a post-globalization world must work together to create accountable global government networks and global information agencies).
- 213 The two founding documents of the responsibility to protect doctrine in international law are the ICISS’s *The Responsibility to Protect* and the High-level Panel’s *A More Secure World*, never enumerate the rationales underlying their policy recommendations. See generally Int’l Comm’n on Intervention and State Sovereignty, *supra* note 8; *A More Secure World: Our Shared Responsibility*, *supra* note 107.
- 214 For example, a classic explanation of the dilemma of humanitarian intervention, Richard Falk’s *Kosovo, World Order, and the Future of International Law*, mixes legal and moral arguments without clearly delineating where one ends and where the other begins. He concludes that intervention in Kosovo was “necessary to prevent a humanitarian catastrophe...[but] impossible because of the political unavailability of an appropriate means.” Falk, *supra* note 96, at 852. What is impossible is finding out what he means by “necessary” and “impossible.”
- 215 *Id.* at 852-53.
- 216 *Id.* at 854-56.
- 217 See U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”); *id.* art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.”).
- 218 See, e.g., Falk, *supra* note 96, at 852-53 (noting the disastrous consequences that would occur in the event of non-intervention).
- 219 Int’l Comm’n on Intervention and State Sovereignty, *supra* note 8, at XI-XIII; *A More Secure World: Our Shared Responsibility*, *supra* note 107, PP 17-43.
- 220 See *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* 91-174 (J.L. Holzgrefe & Robert O. Keohane, eds., 2004)

(discussing the context, ethics, law, and politics of humanitarian intervention); Fernando R. Tesón, Humanitarian Intervention: An Inquiry into Law and Morality 3-18 (2d. ed. 1997) (arguing that the rights of states derive from human rights and consequently wars in defense of human rights are just); Mirko Bagaric & John R. Morss, [Transforming Humanitarian Intervention from an Expedient Accident to a Categorical Imperative](#), 30 *Brook. J. Int'l L.* 421, 423 (2005) (“[A]ltruism needs to be established in an administrative manner.”); Gareth Evans, [From Humanitarian Intervention to the Responsibility to Protect](#), 24 *Wis. Int'l L.J.* 703, 704-12 (2006) (discussing the development of “the responsibility to protect”); Ryan Goodman, [Humanitarian Intervention and Pretexts for War](#), 100 *Am. J. Int'l L.* 107, 107 (2006) (“contend[ing] that legalizing UHI [unilateral humanitarian intervention] should in important respects discourage wars with ulterior motives”); Thomas H. Lee, [The Augustinian Just War Tradition and the Problem of Pretext in Humanitarian Intervention](#), 28 *Fordham Int'l L.J.* 756, 757-62 (2005) (attempting to show how the present laws of war might be viewed as consistent with the Augustinian just war tradition); James W. Smith III, [Unilateral Humanitarian Intervention and the Just Cause Requirement: Should the Denial of Self-Determination to Indigenous People Be a Valid Basis for Humanitarian Intervention? Yes](#), 31 *Am. Indian L. Rev.* 699, 701-03 (2007) (discussing unilateral intervention and its connection to indigenous populations); Fernando R. Tesón, [The Vexing Problem of Authority in Humanitarian Intervention: A Proposal](#), 24 *Wis. Int'l L.J.* 761, 771-72 (2006) [hereinafter Tesón, Vexing Problem] (proposing a Court of Human Security to oversee all responses to humanitarian crises including intervention).

221 See, e.g., Kofi Annan, *The Question of Intervention* 3-19 (1999) (containing public statements by former Secretary-General Kofi Annan regarding intervention); Tesón, *supra* note 220, at 3-155 (providing a philosophical defense of humanitarian intervention); Tesón, *Vexing Problem*, *supra* note 220, at 761-62 (“[T]he institutions for humanitarian intervention should serve the cosmopolitan interests of humanity, as opposed to the national interests of states and governments.”).

222 The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, P 129, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005). Another former Secretary-General, Javier Perez de Cuellar, expressed a similar sentiment when he said, “It is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity.” The Secretary-General, *Report of the Secretary-General on the Work of the Organization*, P IV, delivered to the General Assembly, U.N. Doc. A/4/61 (Sept. 13, 1991), available at <http://www.undemocracy.com/A-46-1.pdf>.

223 Tesón, *supra* note 220, at 111.

224 John Rawls, *The Law of Peoples* 35 (1999).

225 *Id.* at 37.

226 *Id.* at 61.

227 *Id.*

228 *Id.* at 93-94 n.6.

229 Michael Walzer, *Just and Unjust wars* 90-91 (1977).

230 *Id.* at 90.

231 Michael Walzer, *The Moral Standing of States: A Response to Four Critics*, 9 *Phil. & Pub. Aff.* 209, 210 (1980).

232 *Id.* at 218.

- 233 Id. at 101. The other justifications for intervention arise when (1) one political community revolts against another political community, preventing it from asserting its independence and (2) another foreign government intervenes to favor one side while a civil war is in progress. Id. at 90.
- 234 Purportedly humanitarian interventions were undertaken by France, Britain, and Russia to redress the Turkish massacre of the Greeks in 1830, by Austria, France, Britain, and others in Syria in 1860, and by Russia to prevent Turkish persecution of Christians in Eastern Europe in 1877. Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, in *Law and Civil War in the Modern World* 229, 232 (John Norton Moore ed., 1974).
- 235 U.N. Charter art. 2, para. 4.
- 236 Id. art. 55.
- 237 See Ahmed M. Rifaat, *International Aggression: A Study of the Legal Concept: Its Development and Definition in International Law* 120-21 (1979) (explaining Article 2(4)); Lillich, *supra* note 234, at 236-37 (arguing that humanitarian intervention does not violate the U.N. Charter).
- 238 See U.N. Charter art. 1, para. 1 (noting that the purposes of the United Nations include maintenance of “international peace and security” and “the suppression of acts of aggression or other breaches of the peace” but not protection of states from international judgments for crimes committed against their own citizens).
- 239 *A More Secure World: Our Shared Responsibility*, *supra* note 107, P 200.
- 240 Id.
- 241 See U.N. Charter art. 1, para. 1 (stating that one of the purposes of the United Nations is “to maintain international peace and security”).
- 242 *A More Secure World: Our Shared Responsibility*, *supra* note 107, P 200.
- 243 See, e.g., Stanley Hoffman, *Intervention: Should It Go On, Can It Go On?*, in *Ethics and Foreign Intervention* 26, 30 (Deen K. Chatterjee & Don E. Scheid eds., 2003) (discussing alternatives to Security Council authorization).
- 244 Brownlie, *supra* note 69, at 7.
- 245 See *Legality of Use of Force*, *supra* note 92, at 12-13 (highlighting various interventions justified by the purpose of protecting civilians from their own governments).
- 246 Id. at 12. Ergec limited his examples to interventions in the twentieth century. For examples of humanitarian interventions prior to the 20th century, see *supra* note 234 and accompanying text.
- 247 For example, James Rubin, the State Department spokesman before the NATO campaign in Kosovo, stated that “the Serb side is so far out of line with accepted norms of international behavior, and the dangers of not taking preventative action are so great in

terms of humanitarian suffering and further violations of international law that we believe we have legitimate grounds to act.” James P. Rubin, Spokesman, U.S. Dep’t. of State, Daily Press Briefing (Mar. 16, 1999), available at <http://usembassy-israel.org.il/publish/press/state/archive/1999/march/sd2317.htm>.

- 248 [Military and Paramilitary Activities \(Nicar. v. U.S.\)](#), 1986 I.C.J. 14, 134-35 (June 27) (“The use of force ... for the preservation of human rights in Nicaragua cannot afford a legal justification for the conduct of the United States.”).
- 249 See *id.*; see also *A More Secure World: Our Shared Responsibility*, *supra* note 107, P 200 (condemning non-intervention that serves to protect “atrocities, such as large scale violations of international humanitarian law”).
- 250 See *A More Secure World: Our Shared Responsibility*, *supra* note 107, P 200 (“The principle of non-intervention in internal affairs cannot be used to protect genocidal acts or other atrocities, such as large-scale violations of international humanitarian law or large-scale ethnic cleansing.”).
- 251 Commentary (First Reading) on Article 33, 35 U.N. GAOR Supp. (No. 10), U.N. Doc. A/35/10, reprinted in [1980] 2 Y.B. Int’l L. Comm’n 34, U.N. Doc. A/CN.4/SER.A/1980 (Part 2). The International Law Commission has expressed the state of necessity in a slightly different way. It says the following:
1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State, unless the act:
 - (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
 - (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
 - (a) The international obligation in question excludes the possibility of invoking necessity; or
 - (b) The State contributed to the situation of necessity.
- Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 26, 56 U.N. GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10, reprinted in [2001] 2 Y.B. Int’l L. Comm’n 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2). The final articles appear in James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* 61 (2002).
- 252 See Frederik Harhoff, *Unauthorized Humanitarian Interventions-- Armed Violence in the Name of Humanity?*, 70 *Nordic J. Int’l L.* 65, 112-19 (2001) (discussing humanitarian intervention in light of the prohibition of the use of force); Ian Johnstone, *The Plea of “Necessity” in International Legal Discourse: Humanitarian Intervention and Counter-terrorism*, 43 *Colum. J. Transnat’l L.* 337, 387-88 (2005) (arguing that intervention may be legal under the doctrine of necessity); Jens Elo Rytter, *Humanitarian Intervention without the Security Council: From San Francisco to Kosovo--and Beyond*, 70 *Nordic J. Int’l L.* 121, 133-36 (2001) (discussing the validity of interventions without Security Council authorization); Ole Spiermann, *Humanitarian Intervention as a Necessity and the Threat or Use of Jus Cogens*, 71 *Nordic J. Int’l L.* 523, 542-43 (2002) (discussing issues related to necessity and the use of force).
- 253 Harhoff, *supra* note 252, at 114.
- 254 Johnstone, *supra* note 252, at 339.
- 255 See Michael D. Bayles, *Reconceptualizing Necessity and Duress*, in *Justification and Excuse in the Criminal Law: A Collection of Essays* 429, 429-458 (Michael Louis Corrado ed., 1994); see generally *Justification and Excuse: Comparative Perspectives* (Albin Eser & George P. Fletcher eds., 1987) (discussing the doctrine of necessity in international law).
- 256 *Legality of Use of Force*, *supra* note 92, at 13-14.

- 257 See Fernando Tesón, [Defending International Law](#), 11 *Int'l Legal Theory* 87, 95 (2005) [hereinafter Tesón, *Defending International Law*] (describing and rejecting the utilitarian approach to humanitarian intervention).
- 258 See, e.g., Wedgwood, *supra* note 87, at 829 (focusing on Kosovo and the result of NATO's bombing campaign).
- 259 See, e.g., *id.* at 834 (discussing the potential impact that NATO's bypass of the U.N. Security Council may have on future humanitarian interventions).
- 260 See Tesón, *Defending International Law*, *supra* note 257, at 93-95 (describing how different theoretical approaches justify the responsibility to protect).
- 261 *Id.* at 94.
- 262 For a discussion of utilitarian and deontological approaches to humanitarian intervention, see *id.* (arguing that "[t]he argument for humanitarian intervention is located midway between strict deontological approaches and consequential ones like utilitarianism").
- 263 Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51, June 8, 1977, 1125 U.N.T.S. 3.
- 264 Int'l Comm'n on Intervention and State Sovereignty, *supra* note 8, at VIII.
- 265 See *id.* at 44 (discussing the financial consequences of intervention).
- 266 Richard Wasserstrom, Book Review, 92 *Harv. L. Rev.* 536, 543 (1978) (reviewing Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (1977)).
- 267 A More Secure World: Our Shared Responsibility, *supra* note 107, P 200.
- 268 See Ausma Zehanat Khan, The [Unquiet Dead: Humanitarian Intervention, the Fall of Srebrenica, and Political Will as a Normative Linchpin](#), 42 *Osgoode Hall L.J.* 704, 705 (2004) (arguing that realization of a doctrine of humanitarian intervention is critical because "the danger of unwillingness to articulate and stand by conditions and circumstances that require states to intervene is that future Srebrenicas will occur undeterred and with impunity").
- 269 The literature on the binding nature of international law is vast. Fernando Tesón has summarized, "There is a generalized sense that sovereign governments pay only lip-service to international law, and that, when they do refer to international rights and duties, their apparently public-spirited statements are not statements of law, but self-serving utterances cloaked in legal language." Fernando R. Tesón, *International Law*, in *The Oxford Handbook of Legal Studies* 941, 941 (Peter Cane & Mark Tushnet eds., 2003).
- 270 See Int'l Comm'n on Intervention and State Sovereignty, *supra* note 8, at 51-52 (discussing the sources of the legitimacy of the United Nations).
- 271 A More Secure World: Our Shared Responsibility, *supra* note 107, P 204 ("The effectiveness of the global collective security system, as with any other legal order, depends ultimately not only on the legality of decisions but also on the common perception of their legitimacy ...").

- 272 Press Release, Kofi Annan, Secretary-General, Two Concepts of Sovereignty, U.N. Doc. SG/SM/7136 (Sept. 18, 1999).
- 273 In the run-up to the Iraq War, Bush asked the United Nations General Assembly, "Will the United Nations serve the purpose of its founding, or will it be irrelevant?" John King & Suzanne Malveaux, Bush: U.S. Will Move on Iraq If U.N. Won't, CNN.com, Sept. 13, 2002, [http:// archives.cnn.com/2002/US/09/12/bush.speech.un/](http://archives.cnn.com/2002/US/09/12/bush.speech.un/).
- 274 See African Charter, *supra* note 174, art. 9, P 2 (outlining the free speech rights); ICCPR, *supra* note 4, art. 19, P 2 (establishing free speech as a fundamental human right); UDHR, *supra* note 4, art. 19 (including freedom of expression as a fundamental human right protected by the instrument); European Convention, *supra* note 152, art. 10 (establishing freedom of speech in European nations).
- 275 Rawls, *supra* note 224, at 25.
- 276 *Id.* at 24.
- 277 Participation in the political process is one of the main purposes of the freedom of speech. See, e.g., Thomas Emerson, [Toward a General Theory of the First Amendment](#), 72 Yale L.J. 877, 882 (1963) ("The third main function of a system of freedom of expression is to provide for participation in decision-making.").
- 278 Richard W. Miller, Respectable Oppressors, Hypocritical Liberators: Morality, Intervention and Reality, in Ethics and Foreign Intervention, *supra* note 243, at 215, 237 (Deen K. Chatterjee & Don E. Scheid eds., 2003).
- 279 *Id.* at 220-21.
- 280 Walzer, *supra* note 229, at 101.
- 281 See, e.g., ICCPR, *supra* note 4, arts. 6-27 (referring to human rights generally).
- 282 U.N. Charter art. 2, para. 4; *id.* art. 55.
- 283 See *id.* art. 55 (not differentiating between genocide and other violations of human rights).
- 284 See Rifaat, *supra* note 237, at 120-21 (examining the responsibility to protect in light of territorial sovereignty rights); Lillich, *supra* note 234, 235-44 (discussing the responsibility to protect).
- 285 Brownlie, *supra* note 69, at 7.
- 286 See Lillich, *supra* note 234, at 232 (describing examples of humanitarian intervention in the past century).
- 287 Examples include the French, British, and Russian intervention to prevent the Turkish massacre of Greeks in 1830, and the Russian intervention to prevent Turkish persecution of Christians in Eastern Europe in 1877. See *id.*

- 288 See [Restatement \(Third\) of Foreign Relations Law § 702](#) cmt. m (1987) (including suppression of the freedom of speech amongst the violations of human rights justifying intervention under customary international law).
- 289 Commentary (First Reading) on Article 33, *supra* note 251, at 33.
- 290 See, e.g., Harhoff, *supra* note 252, at 114 (arguing that the prevention of “serious violations of recognised and fundamental international human rights” is an essential interest of a state).
- 291 See, e.g., ICCPR, *supra* note 4, art. 19, P 2 (“Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideal of all kinds.”).
- 292 See, e.g., ICCPR, *supra* note 4, arts. 1-27 (discussing the civil and political rights of individuals); UDHR, *supra* note 4, arts. 1-29 (creating binding international obligations for nation-states to respect certain, enumerated individual rights).
- 293 ICCPR, *supra* note 4, arts. 1-27; UDHR, *supra* note 4, arts. 1-29.
- 294 Annan, *supra* note 98, at 49.
- 295 See, e.g., Johanna Granville, Radio Free Europe’s Impact on the Kremlin in the Hungarian Crisis of 1956: Three Hypotheses, 39 *Can. J. Hist.* 515, 516-18 (2004) (describing the impact of Radio Europe).
- 296 See D’Amato, *supra* note 49, at 1112 (discussing the views expounded by critics of international law).
- 297 See, e.g., Cassese, *Ex Iniuria Ius Oritur*, *supra* note 90, at 23 (expressing concern that departure from U.N. standards will open a “Pandora’s box” of military interventions).
- 298 [Restatement \(Third\) of Foreign Relations Law § 702](#).
- 299 ICCPR, *supra* note 4, art. 19; UDHR, *supra* note 4, art. 19.
- 300 See G.A. Res. 60/147, Annex, P 3, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) (obligating the states to provide remedies for victims of human rights violations).
- 301 The General Assembly adopted the following language concerning the responsibility to protect:
Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.... In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.
G.A. Res. 60/1, *supra* note 110, PP 138-39.
- 302 *Id.* PP 119, 138-39.
- 303 See Int’l Comm’n on Intervention and State Sovereignty, *supra* note 8, at XIII (“The Permanent Five members of the Security

Council should agree not to apply their veto power, in matters where their vital state interests are not involved, to obstruct the passage of resolutions authorizing military intervention for human protection purposes for which there is otherwise majority support.”).

304 Id. at XII.

305 Jamie Frederic Metz, [Rwandan Genocide and the International Law of Radio Jamming](#), 91 Am. J. Int'l. L. 628, 650-51 (1997).

306 See Samantha Power, *A Problem From Hell: America and the Age of Genocide* 371 (2003) (“The United States could destroy the antenna. It could transmit ‘counterbroadcasts’ urging perpetrators to stop the genocide. Or it could jam the hate radio station’s broadcasts.”).

307 See, e.g., Defeis, *supra* note 126, at 60-78 (describing regulation of hate speech); Stephanie Farrior, [Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech](#), 14 Berkeley J. Int'l L. 1 (1996) (discussing differing approaches to dealing with hate speech); Friedrich Kubler, [How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights](#), 27 Hofstra L. Rev. 335, 340-54 (1998) (addressing the problem of hate speech); Sedler, *supra* note 159, 378-84 (comparing the United States’ approach to that of other countries).

308 For thorough explanations of the debate, see, e.g., Danish Inst. Int'l Aff., *Humanitarian Intervention: Legal and Political Aspects* 77-95 (1999) (discussing the legal and political aspect of interventions); Tom J. Farer, *An Inquiry into the Legitimacy of Humanitarian Intervention*, in *Law and Force in the New International Order* 185, 192-93 (Lori Fisler Damrosch & David J. Scheffer eds., 1991); Adam Roberts, *The So-Called “Right” of Humanitarian Intervention*, 2000 Y.B. Int'l Humanitarian L. 3, 29-51 (describing the debate regarding the responsibility to protect).

309 See Martha Finnemore, *The Purpose of Intervention: Changing Beliefs About the Use of Force* 15 (2003) (articulating ways states justify intervention).

310 See *id.* (discussing state justification for intervention). According to Finnemore, [e]very intervention leaves a long trail of justification in its wake When states justify their interventions, they draw on and articulate shared values and expectations that other decision makers and other publics in other states hold. Justification is literally an attempt to connect one’s actions with standards of justice or, perhaps more generically, with standards of appropriate and acceptable behavior.
Id. at 15.

311 Martin Spah, *Holy Alliance*, in 7 *The Catholic Encyclopedia* (1910), available at <http://www.newadvent.org/cathen/07398a.htm>.

312 Id.

313 Id.

314 Oscar Schachter, *International Law in Theory and Practice* 126 (1991).

315 Id.

316 See *id.* at 128 (“My position, in a nutshell, is that international law does not, and should not, legitimize the use of force across national lines except for self-defense (including collective defense) and enforcement measures ordered by the Security Council.”).

317 G.A. Res. 60/1, *supra* note 110, P 138; S.C. Res. 1674, *supra* note 111, P 4.

318 G.A. Res. 60/1, *supra* note 110, PP 138-39.

319 See Goodman & Jinks, *supra* note 55, at 630-55 (analyzing the interplay between law, legitimacy and state behavior).

320 Goodman, *supra* note 220, at 110.

End of Document

© 2011 Thomson Reuters. No claim to original U.S. Government Works.

HEINONLINE

Citation: 4 Harv. L. Rev. 193 1890-1891

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Mon May 2 14:26:07 2011

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0017-811X](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0017-811X)

HARVARD LAW REVIEW.

VOL. IV.

DECEMBER 15, 1890.

NO. 5.

THE RIGHT TO PRIVACY.

"It could be done only on principles of private justice, moral fitness, and public convenience, which, when applied to a new subject, make common law without a precedent; much more when received and approved by usage."

WILLES, J., in *Millar v. Taylor*, 4 Burr. 2303, 2312.

THAT the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession—intangible, as well as tangible.

Thus, with the recognition of the legal value of sensations, the protection against actual bodily injury was extended to prohibit mere attempts to do such injury; that is, the putting another in

fear of such injury. From the action of battery grew that of assault.¹ Much later there came a qualified protection of the individual against offensive noises and odors, against dust and smoke, and excessive vibration. The law of nuisance was developed.² So regard for human emotions soon extended the scope of personal immunity beyond the body of the individual. His reputation, the standing among his fellow-men, was considered, and the law of slander and libel arose.³ Man's family relations became a part of the legal conception of his life, and the alienation of a wife's affections was held remediable.⁴ Occasionally the law halted,—as in its refusal to recognize the intrusion by seduction upon the honor of the family. But even here the demands of society were met. A mean fiction, the action *per quod servitium amisit*, was resorted to, and by allowing damages for injury to the parents' feelings, an adequate remedy was ordinarily afforded.⁵ Similar to the expansion of the right to life was the growth of the legal conception of property. From corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and processes of the mind,⁶

¹ Year Book, Lib. Ass., folio 99, pl. 60 (1348 or 1349), appears to be the first reported case where damages were recovered for a civil assault.

² These nuisances are technically injuries to property; but the recognition of the right to have property free from interference by such nuisances involves also a recognition of the value of human sensations.

³ Year Book, Lib. Ass., folio 177, pl. 19 (1356), (2 Finl. Reeves Eng. Law, 395) seems to be the earliest reported case of an action for slander.

⁴ *Winsmore v. Greenbank*, Willes, 577 (1745).

⁵ Loss of service is the gist of the action; but it has been said that "we are not aware of any reported case brought by a parent where the value of such services was held to be the measure of damages." Cassoday, J., in *Lavery v. Crooke*, 52 Wis. 612, 623 (1881). First the fiction of constructive service was invented; *Martin v. Payne*, 9 John. 387 (1812). Then the feelings of the parent, the dishonor to himself and his family, were accepted as the most important element of damage. *Bedford v. McKowl*, 3 Esp. 119 (1800); *Andrews v. Askey*, 8 C. & P. 7 (1837); *Phillips v. Hoyle*, 4 Gray, 568 (1855); *Phelin v. Kenderdine*, 20 Pa. St. 354 (1853). The allowance of these damages would seem to be a recognition that the invasion upon the honor of the family is an injury to the parent's person, for ordinarily mere injury to parental feelings is not an element of damage, *e. g.*, the suffering of the parent in case of physical injury to the child. *Flemington v. Smithers*, 2 C. & P. 292 (1827); *Black v. Carrollton R. R. Co.*, 10 La. Ann. 33 (1855); *Covington Street Ry. Co. v. Packer*, 9 Bush, 455 (1872).

⁶ "The notion of Mr. Justice Yates that nothing is property which cannot be earmarked and recovered in detinue or trover, may be true in an early stage of society, when property is in its simple form, and the remedies for violation of it also simple, but is not true in a more civilized state, when the relations of life and the interests arising therefrom are complicated." Erle, J., in *Jefferys v. Boosey*, 4 H. L. C. 815, 869 (1854).

as works of literature and art,¹ goodwill,² trade secrets, and trademarks.³

This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone."⁴ Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons;⁵ and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer.⁶ The alleged facts of a somewhat notorious case brought before an inferior tribunal in New York a few months ago,⁷ directly involved the consideration

¹ Copyright appears to have been first recognized as a species of private property in England in 1558. Drone on Copyright, 54, 61.

² *Gibblett v. Read*, 9 Mod. 459 (1743), is probably the first recognition of goodwill as property.

³ *Hogg v. Kirby*, 8 Ves. 215 (1803). As late as 1742 Lord Hardwicke refused to treat a trade-mark as property for infringement upon which an injunction could be granted. *Blanchard v. Hill*, 2 Atk. 484.

⁴ Cooley on Torts, 2d ed., p. 29.

⁵ 8 Amer. Law Reg. N. S. 1 (1869); 12 Wash. Law Rep. 353 (1884); 24 Sol. J. & Rep. 4 (1879).

⁶ *Scribner's Magazine*, July, 1890. "The Rights of the Citizen: To his Reputation," by E. L. Godkin, Esq., pp. 65, 67.

⁷ *Marion Manola v. Stevens & Myers*, N. Y. Supreme Court, "New York Times" of June 15, 18, 21, 1890. There the complainant alleged that while she was playing in the Broadway Theatre, in a rôle which required her appearance in tights, she was, by means of a flash light, photographed surreptitiously and without her consent, from one of the boxes by defendant Stevens, the manager of the "Castle in the Air" company, and defendant Myers, a photographer, and prayed that the defendants might be restrained from making use of the photograph taken. A preliminary injunction issued *ex parte*, and a time was set for argument of the motion that the injunction should be made permanent, but no one then appeared in opposition.

of the right of circulating portraits ; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration.

Of the desirability — indeed of the necessity — of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual ; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence.

It is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is.

Owing to the nature of the instruments by which privacy is invaded, the injury inflicted bears a superficial resemblance to the wrongs dealt with by the law of slander and of libel, while a legal remedy for such injury seems to involve the treatment of mere wounded feelings, as a substantive cause of action. The principle on which the law of defamation rests, covers, however, a radically different class of effects from those for which attention is now asked. It deals only with damage to reputation, with the injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows. The matter published of him, however widely circulated, and however unsuited to publicity, must, in order to be actionable, have a direct tendency to injure him in his intercourse with others, and even if in writing or in print, must subject him to the hatred, ridicule, or contempt of his fellow-men,—the effect of the publication upon his estimate of himself and upon his own feelings not forming an essential element in the cause of action. In short, the wrongs and correlative rights recognized by the law of slander and libel are in their nature material rather than spiritual. That branch of the law simply extends the protection surrounding physical property to certain of the conditions necessary or helpful to worldly prosperity. On the other hand, our law recognizes no principle upon which compensation can be granted for mere injury to the feelings. However painful the mental effects upon another of an act, though purely wanton or even malicious, yet if the act itself is otherwise lawful, the suffering inflicted is *damnum absque injuria*. Injury of feelings may indeed be taken account of in ascertaining the amount of damages when attending what is recognized as a legal injury;¹

¹ Though the legal value of "feelings" is now generally recognized, distinctions have been drawn between the several classes of cases in which compensation may or may not be recovered. Thus, the fright occasioned by an assault constitutes a cause of action, but fright occasioned by negligence does not. So fright coupled with bodily injury affords a foundation for enhanced damages; but, ordinarily, fright unattended by bodily injury cannot be relied upon as an element of damages, even where a valid cause of action exists, as in trespass *quare clausum fregit*. *Wyman v. Leavitt*, 71 Me. 227; *Canning v. Williamstown*, 1 Cush. 451. The allowance of damages for injury to the parents'

but our system, unlike the Roman law, does not afford a remedy even for mental suffering which results from mere contumely and insult, from an intentional and unwarranted violation of the "honor" of another.¹

It is not however necessary, in order to sustain the view that the common law recognizes and upholds a principle applicable to cases of invasion of privacy, to invoke the analogy, which is but superficial, to injuries sustained, either by an attack upon reputation or by what the civilians called a violation of honor; for the legal doctrines relating to infractions of what is ordinarily termed the common-law right to intellectual and artistic property are, it is believed, but instances and applications of a general right to privacy, which properly understood afford a remedy for the evils under consideration.

The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.² Under our system of government, he can never be compelled to express them (except when upon the witness-stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not depend upon the particular

feelings, in case of seduction, abduction of a child (*Stowe v. Heywood*, 7 All. 118), or removal of the corpse of child from a burial-ground (*Meagher v. Driscoll*, 99 Mass. 281), are said to be exceptions to a general rule. On the other hand, injury to feelings is a recognized element of damages in actions of slander and libel, and of malicious prosecution. These distinctions between the cases, where injury to feelings does and where it does not constitute a cause of action or legal element of damages, are not logical, but doubtless serve well as practical rules. It will, it is believed, be found, upon examination of the authorities, that wherever substantial mental suffering would be the natural and probable result of the act, there compensation for injury to feelings has been allowed, and that where no mental suffering would ordinarily result, or if resulting, would naturally be but trifling, and, being unaccompanied by visible signs of injury, would afford a wide scope for imaginative ills, there damages have been disallowed. The decisions on this subject illustrate well the subjection in our law of logic to common-sense.

¹ "Injuria, in the narrower sense, is every intentional and illegal violation of honour, *i.e.*, the whole personality of another." "Now an outrage is committed not only when a man shall be struck with the fist, say, or with a club, or even flogged, but also if abusive language has been used to one." Salkowski, *Roman Law*, p. 668 and p. 669, n. 2.

² "It is certain every man has a right to keep his own sentiments, if he pleases. He has certainly a right to judge whether he will make them public, or commit them only to the sight of his friends." Yates, J., in *Millar v. Taylor*, 4 Burr. 2303, 2379 (1769).

method of expression adopted. It is immaterial whether it be by word¹ or by signs,² in painting,³ by sculpture, or in music.⁴ Neither does the existence of the right depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression.⁵ The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece. In every such case the individual is entitled to decide whether that which is his shall be given to the public.⁶ No other has the right to publish his productions in any form, without his consent. This right is wholly independent of the material on which, or the means by which, the thought, sentiment, or emotion is expressed. It may exist independently of any corporeal being, as in words spoken, a song sung, a drama acted. Or if expressed on any material, as a poem in writing, the author may have parted with the paper, without forfeiting any proprietary right in the composition itself. The right is lost only when the author himself communicates his production to the public,—in other words,

¹ *Nicols v. Pitman*, 26 Ch. D. 374 (1884).

² *Lee v. Simpson*, 3 C. B. 871, 881; *Daly v. Palmer*, 6 Blatchf. 256.

³ *Turner v. Robinson*, 10 Ir. Ch. 121; s. c. *ib.* 510.

⁴ *Drone on Copyright*, 102.

⁵ "Assuming the law to be so, what is its foundation in this respect? It is not, I conceive, referable to any consideration peculiarly literary. Those with whom our common law originated had not probably among their many merits that of being patrons of letters; but they knew the duty and necessity of protecting property, and with that general object laid down rules providently expansive,—rules capable of adapting themselves to the various forms and modes of property which peace and cultivation might discover and introduce.

"The produce of mental labor, thoughts and sentiments, recorded and preserved by writing, became, as knowledge went onward and spread, and the culture of man's understanding advanced, a kind of property impossible to disregard, and the interference of modern legislation upon the subject, by the stat. 8 Anne, professing by its title to be 'For the encouragement of learning,' and using the words 'taken the liberty,' in the preamble, whether it operated in augmentation or diminution of the private rights of authors, having left them to some extent untouched, it was found that the common law, in providing for the protection of property, provided for their security, at least before general publication by the writer's consent." *Knight Bruce, V. C., in Prince Albert v. Strange*, 2 DeGex & Sm. 652, 695 (1849).

⁶ "The question, however, does not turn upon the form or amount of mischief or advantage, loss or gain. The author of manuscripts, whether he is famous or obscure, low or high, has a right to say of them, if innocent, that whether interesting or dull, light or heavy, saleable or unsaleable, they shall not, without his consent, be published." *Knight Bruce, V. C., in Prince Albert v. Strange*, 2 DeGex & Sm. 652, 694.

publishes it.¹ It is entirely independent of the copyright laws, and their extension into the domain of art. The aim of those statutes is to secure to the author, composer, or artist the entire profits arising from publication; but the common-law protection enables him to control absolutely the act of publication, and in the exercise of his own discretion, to decide whether there shall be any publication at all.² The statutory right is of no value, *unless* there is a publication; the common-law right is lost *as soon as* there is a publication.

What is the nature, the basis, of this right to prevent the publication of manuscripts or works of art? It is stated to be the enforcement of a right of property;³ and no difficulty arises in accepting this view, so long as we have only to deal with the reproduction of literary and artistic compositions. They certainly possess many of the attributes of ordinary property: they are transferable; they have a value; and publication or reproduction is a use by which that value is realized. But where the value of the production is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one of property, in the common acceptance

¹ *Duke of Queensberry v. Shebbeare*, 2 Eden, 329 (1758); *Bartlett v. Crittenden*, 5 McLean, 32, 41 (1849).

² *Drone on Copyright*, pp. 102, 104; *Parton v. Prang*, 3 Clifford, 537, 548 (1872); *Jefferys v. Boosey*, 4 H. L. C. 815, 867, 962 (1854).

³ "The question will be whether the bill has stated facts of which the court can take notice, as a case of civil property, which it is bound to protect. The injunction cannot be maintained on any principle of this sort, that if a letter has been written in the way of friendship, either the continuance or the discontinuance of the friendship affords a reason for the interference of the court," Lord Eldon in *Gee v. Pritchard*, 2 Swanst. 402, 413 (1818).

"Upon the principle, therefore, of protecting property, it is that the common law, in cases not aided or prejudiced by statute, shelters the privacy and seclusion of thought and sentiments committed to writing, and desired by the author to remain not generally known." Knight Bruce, V. C., in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 695.

"It being conceded that reasons of expediency and public policy can never be made the sole basis of civil jurisdiction, the question, whether upon any ground the plaintiff can be entitled to the relief which he claims, remains to be answered; and it appears to us that there is only one ground upon which his title to claim, and our jurisdiction to grant, the relief, can be placed. We must be satisfied, that the publication of private letters, without the consent of the writer, is an invasion of an exclusive right of property which remains in the writer, even when the letters have been sent to, and are still in the possession of his correspondent." Duer, J., in *Woolsey v. Judd*, 4 Duer, 379, 384 (1855).

of that term. A man records in a letter to his son, or in his diary, that he did not dine with his wife on a certain day. No one into whose hands those papers fall could publish them to the world, even if possession of the documents had been obtained rightfully; and the prohibition would not be confined to the publication of a copy of the letter itself, or of the diary entry; the restraint extends also to a publication of the contents. What is the thing which is protected? Surely, not the intellectual act of recording the fact that the husband did not dine with his wife, but that fact itself. It is not the intellectual product, but the domestic occurrence. A man writes a dozen letters to different people. No person would be permitted to publish a list of the letters written. If the letters or the contents of the diary were protected as literary compositions, the scope of the protection afforded should be the same secured to a published writing under the copyright law. But the copyright law would not prevent an enumeration of the letters, or the publication of some of the facts contained therein. The copyright of a series of paintings or etchings would prevent a reproduction of the paintings as pictures; but it would not prevent a publication of a list or even a description of them.¹ Yet in the famous case of

¹ "A work lawfully published, in the popular sense of the term, stands in this respect, I conceive, differently from a work which has never been in that situation. The former may be liable to be translated, abridged, analyzed, exhibited in morsels, complimented, and otherwise treated, in a manner that the latter is not.

"Suppose, however,—instead of a translation, an abridgment, or a review,—the case of a catalogue,—suppose a man to have composed a variety of literary works ('innocent,' to use Lord Eldon's expression), which he has never printed or published, or lost the right to prohibit from being published,—suppose a knowledge of them unduly obtained by some unscrupulous person, who prints with a view to circulation a descriptive catalogue, or even a mere list of the manuscripts, without authority or consent, does the law allow this? I hope and believe not. The same principles that prevent more candid piracy must, I conceive, govern such a case also.

"By publishing of a man that he has written to particular persons, or on particular subjects, he may be exposed, not merely to sarcasm, he may be ruined. There may be in his possession returned letters that he had written to former correspondents, with whom to have had relations, however harmlessly, may not in after life be a recommendation; or his writings may be otherwise of a kind squaring in no sort with his outward habits and worldly position. There are callings even now in which to be convicted of literature, is dangerous, though the danger is sometimes escaped.

"Again, the manuscripts may be those of a man on account of whose name alone a mere list would be matter of general curiosity. How many persons could be mentioned, a catalogue of whose unpublished writings would, during their lives or afterwards, command a ready sale!" Knight Bruce, V. C., in *Prince Albert v. Strange*, 2 De Gex & Sm. 652, 693.

Prince Albert *v.* Strange, the court held that the common-law rule prohibited not merely the reproduction of the etchings which the plaintiff and Queen Victoria had made for their own pleasure, but also "the publishing (at least by printing or writing), though not by copy or resemblance, a description of them, whether more or less limited or summary, whether in the form of a catalogue or otherwise."¹ Likewise, an unpublished collection of news possessing no element of a literary nature is protected from piracy.²

That this protection cannot rest upon the right to literary or artistic property in any exact sense, appears the more clearly

¹ "A copy or impression of the etchings would only be a means of communicating knowledge and information of the original, and does not a list and description of the same? The means are different, but the object and effect are similar; for in both, the object and effect is to make known to the public more or less of the unpublished work and composition of the author, which he is entitled to keep wholly for his private use and pleasure, and to withhold altogether, or so far as he may please, from the knowledge of others. Cases upon abridgments, translations, extracts, and criticisms of published works have no reference whatever to the present question; they all depend upon the extent of right under the acts respecting copyright, and have no analogy to the exclusive rights in the author of unpublished compositions which depend entirely upon the common-law right of property." Lord Cottenham in *Prince Albert v. Strange*, 1 McN. & G. 23, 43 (1849). "Mr. Justice Yates, in *Millar v. Taylor*, said, that an author's case was exactly similar to that of an inventor of a new mechanical machine; that both original inventions stood upon the same footing in point of property, whether the case were mechanical or literary, whether an epic poem or an orrery; that the immorality of pirating another man's invention was as great as that of purloining his ideas. Property in mechanical works or works of art, executed by a man for his own amusement, instruction, or use, is allowed to subsist, certainly, and may, before publication by him, be invaded, not merely by copying, but by description or by catalogue, as it appears to me. A catalogue of such works may in itself be valuable. It may also as effectually show the bent and turn of the mind, the feelings and taste of the artist, especially if not professional, as a list of his papers. The portfolio or the studio may declare as much as the writing-table. A man may employ himself in private in a manner very harmless, but which, disclosed to society, may destroy the comfort of his life, or even his success in it. Every one, however, has a right, I apprehend, to say that the produce of his private hours is not more liable to publication without his consent, because the publication must be creditable or advantageous to him, than it would be in opposite circumstances."

"I think, therefore, not only that the defendant here is unlawfully invading the plaintiff's rights, but also that the invasion is of such a kind and affects such property as to entitle the plaintiff to the preventive remedy of an injunction; and if not the more, yet, certainly, not the less, because it is an intrusion,—an unbecoming and unseemly intrusion,—an intrusion not alone in breach of conventional rules, but offensive to that inbred sense of propriety natural to every man,—if intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life,—into the home (a word hitherto sacred among us), the home of a family whose life and conduct form an acknowledged title, though not their only unquestionable title, to the most marked respect in this country." Knight Bruce, V. C., in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 696, 697.

² *Kiernan v. Manhattan Quotation Co.*, 50 How. Pr. 194 (1876).

when the subject-matter for which protection is invoked is not even in the form of intellectual property, but has the attributes of ordinary tangible property. Suppose a man has a collection of gems or curiosities which he keeps private: it would hardly be contended that any person could publish a catalogue of them, and yet the articles enumerated are certainly not intellectual property in the legal sense, any more than a collection of stoves or of chairs.¹

The belief that the idea of property in its narrow sense was the basis of the protection of unpublished manuscripts led an able court to refuse, in several cases, injunctions against the publication of private letters, on the ground that "letters not possessing the attributes of literary compositions are not property entitled to protection;" and that it was "evident the plaintiff could not have considered the letters as of any value whatever as literary productions, for a letter cannot be considered of value to the author which he never would consent to have published."² But

¹ "The defendants' counsel say, that a man acquiring a knowledge of another's property without his consent is not by any rule or principle which a court of justice can apply (however secretly he may have kept or endeavored to keep it) forbidden without his consent to communicate and publish that knowledge to the world, to inform the world what the property is, or to describe it publicly, whether orally, or in print or writing.

"I claim, however, leave to doubt whether, as to property of a private nature, which the owner, without infringing on the right of any other, may and does retain in a state of privacy, it is certain that a person who, without the owner's consent, express or implied, acquires a knowledge of it, can lawfully avail himself of the knowledge so acquired to publish without his consent a description of the property.

"It is probably true that such a publication may be in a manner or relate to property of a kind rendering a question concerning the lawfulness of the act too slight to deserve attention. I can conceive cases, however, in which an act of the sort may be so circumstanced or relate to property such, that the matter may weightily affect the owner's interest or feelings, or both. For instance, the nature and intention of an unfinished work of an artist, prematurely made known to the world, may be painful and deeply prejudicial against him; nor would it be difficult to suggest other examples. . . .

"It was suggested that, to publish a catalogue of a collector's gems, coins, antiquities, or other such curiosities, for instance, without his consent, would be to make use of his property without his consent; and it is true, certainly, that a proceeding of that kind may not only as much embitter one collector's life as it would flatter another, — may be not only an ideal calamity, — but may do the owner damage in the most vulgar sense. Such catalogues, even when not descriptive, are often sought after, and sometimes obtain very substantial prices. These, therefore, and the like instances, are not necessarily examples merely of pain inflicted in point of sentiment or imagination; they may be that, and something else beside." Knight Bruce, V. C., in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 689, 690.

² *Hoyt v. Mackenzie*, 3 Barb. Ch. 320, 324 (1848); *Wetmore v. Scovell*, 3 Edw. Ch. 515 (1842). See Sir Thomas Plumer in 2 Ves. & B. 19 (1813).

these decisions have not been followed,¹ and it may now be considered settled that the protection afforded by the common law to the author of any writing is entirely independent of its pecuniary value, its intrinsic merits, or of any intention to publish the same, and, of course, also, wholly independent of the material, if any, upon which, or the mode in which, the thought or sentiment was expressed.

Although the courts have asserted that they rested their decisions on the narrow grounds of protection to property, yet there are recognitions of a more liberal doctrine. Thus in the case of *Prince Albert v. Strange*, already referred to, the opinions both of the Vice-Chancellor and of the Lord Chancellor, on appeal, show a more or less clearly defined perception of a principle broader than those which were mainly discussed, and on which they both placed their chief reliance. Vice-Chancellor Knight Bruce referred to publishing of a man that he had "written to particular persons or on particular subjects" as an instance of possibly injurious disclosures as to private matters, that the courts would in a proper case prevent; yet it is difficult to perceive how, in such a case, any right of property, in the narrow sense, would be drawn in question, or why, if such a publication would be restrained when it threatened to expose the victim not merely to sarcasm, but to ruin, it should not equally be enjoined, if it threatened to embitter his life. To deprive a man of the potential profits to be realized by publishing a catalogue of his gems cannot *per se* be a wrong to him. The possibility of future profits is not a right of property which the law ordinarily recognizes; it must, therefore, be an infraction of other rights which constitutes the wrongful act, and that infraction is equally wrongful, whether its results are to forestall the profits that the individual himself might secure by giving the matter a publicity obnoxious to him, or to gain an advantage at the expense of his mental pain and suffering. If the fiction of property in a narrow sense must be preserved, it is still true that the end accomplished by the gossip-monger is attained by the use of that which

¹ *Woolsey v. Judd*, 4 Duer, 379, 404 (1855). "It has been decided, fortunately for the welfare of society, that the writer of letters, though written without any purpose of profit, or any idea of literary property, possesses such a right of property in them, that they cannot be published without his consent, unless the purposes of justice, civil or criminal, require the publication." Sir Samuel Romilly, *arg.*, in *Gee v. Pritchard*, 2 Swanst. 402, 418 (1818). But see High on Injunctions, 3d ed., § 1012, *contra*.

is another's, the facts relating to his private life, which he has seen fit to keep private. Lord Cottenham stated that a man "is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his," and cited with approval the opinion of Lord Eldon, as reported in a manuscript note of the case of *Wyatt v. Wilson*, in 1820, respecting an engraving of George the Third during his illness, to the effect that "if one of the late king's physicians had kept a diary of what he heard and saw, the court would not, in the king's lifetime, have permitted him to print and publish it;" and Lord Cottenham declared, in respect to the acts of the defendants in the case before him, that "privacy is the right invaded." But if privacy is once recognized as a right entitled to legal protection, the interposition of the courts cannot depend on the particular nature of the injuries resulting.

These considerations lead to the conclusion that the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed. In each of these rights, as indeed in all other rights recognized by the law, there inheres the quality of being owned or possessed — and (as that is the distinguishing attribute of property) there may be some propriety in speaking of those rights as property. But, obviously, they bear little resemblance to what is ordinarily comprehended under that term. The principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.¹

¹ "But a doubt has been suggested, whether mere private letters, not intended as literary compositions, are entitled to the protection of an injunction in the same manner as compositions of a literary character. This doubt has probably arisen from the habit of not discriminating between the different rights of property which belong to an unpublished manuscript, and those which belong to a published book. The latter, as I have intimated in another connection, is a right to take the profits of publication. The former is a right to control the act of publication, and to decide whether there shall be any publication at all. It has been called a right of property; an expression perhaps not quite satisfactory, but on the other hand sufficiently descriptive of a right which, however incorporeal, involves many of the essential elements of property, and is at least positive and definite. This expression can leave us in no doubt as to the meaning of the learned

If we are correct in this conclusion, the existing law affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds. For the protection afforded is not confined by the authorities to those cases where any particular medium or form of expression has been adopted, nor to products of the intellect. The same protection is afforded to emotions and sensations expressed in a musical composition or other work of art as to a literary composition; and words spoken, a pantomime acted, a sonata performed, is no less entitled to protection than if each had been reduced to writing. The circumstance that a thought or emotion has been recorded in a permanent form renders its identification easier, and hence may be important from the point of view of evidence, but it has no significance as a matter of substantive right. If, then, the decisions indicate a general right to privacy for thoughts, emotions, and sensations, these should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression.

It may be urged that a distinction should be taken between the

judges who have used it, when they have applied it to cases of unpublished manuscripts. They obviously intended to use it in no other sense, than in contradistinction to the mere interests of feeling, and to describe a substantial right of legal interest." Curtis on Copyright, pp. 93, 94.

The resemblance of the right to prevent publication of an unpublished manuscript to the well-recognized rights of personal immunity is found in the treatment of it in connection with the rights of creditors. The right to prevent such publication and the right of action for its infringement, like the cause of action for an assault, battery, defamation, or malicious prosecution, are not assets available to creditors.

"There is no law which can compel an author to publish. No one can determine this essential matter of publication but the author. His manuscripts, however valuable, cannot, without his consent, be seized by his creditors as property." McLean, J., in *Bartlett v. Crittenden*, 5 McLean, 32, 37 (1849).

It has also been held that even where the sender's rights are not asserted, the receiver of a letter has not such property in it as passes to his executor or administrator as a salable asset. *Eyre v. Higbee*, 22 How. Pr. (N. Y.) 198 (1861).

"The very meaning of the word 'property' in its legal sense is 'that which is peculiar or proper to any person; that which belongs exclusively to one.' The first meaning of the word from which it is derived — *proprius* — is 'one's own.'" Drone on Copyright, p. 6.

It is clear that a thing must be capable of identification in order to be the subject of exclusive ownership. But when its identity can be determined so that individual ownership may be asserted, it matters not whether it be corporeal or incorporeal.

deliberate expression of thoughts and emotions in literary or artistic compositions and the casual and often involuntary expression given to them in the ordinary conduct of life. In other words, it may be contended that the protection afforded is granted to the conscious products of labor, perhaps as an encouragement to effort.¹ This contention, however plausible, has, in fact, little to recommend it. If the amount of labor involved be adopted as the test, we might well find that the effort to conduct one's self properly in business and in domestic relations had been far greater than that involved in painting a picture or writing a book; one would find that it was far easier to express lofty sentiments in a diary than in the conduct of a noble life. If the test of deliberateness of the act be adopted, much casual correspondence which is now accorded full protection would be excluded from the beneficent operation of existing rules. After the decisions denying the distinction attempted to be made between those literary productions which it was intended to publish and those which it was not, all considerations of the amount of labor involved, the degree of deliberation, the value of the product, and the intention of publishing must be abandoned, and no basis is discerned upon which the right to restrain publication and reproduction of such so-called literary and artistic works can be rested, except the right to privacy, as a part of the more general right to the immunity of the person, — the right to one's personality.

It should be stated that, in some instances where protection has been afforded against wrongful publication, the jurisdiction has been asserted, not on the ground of property, or at least not wholly on that ground, but upon the ground of an alleged breach of an implied contract or of a trust or confidence.

Thus, in *Abernethy v. Hutchinson*, 3 L. J. Ch. 209 (1825), where the plaintiff, a distinguished surgeon, sought to restrain the publication in the "Lancet" of unpublished lectures which he had delivered at St. Bartholomew's Hospital in London, Lord Eldon

¹ "Such then being, as I believe, the nature and the foundation of the common law as to manuscripts independently of Parliamentary additions and subtractions, its operation cannot of necessity be confined to literary subjects. That would be to limit the rule by the example. Wherever the produce of labor is liable to invasion in an analogous manner, there must, I suppose, be a title to analogous protection or redress." Knight Bruce, V. C., in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 696.

doubted whether there could be property in lectures which had not been reduced to writing, but granted the injunction on the ground of breach of confidence, holding "that when persons were admitted as pupils or otherwise, to hear these lectures, although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of short-hand, yet they could do that only for the purposes of their own information, and could not publish, for profit, that which they had not obtained the right of selling."

In *Prince Albert v. Strange*, 1 McN. & G. 25 (1849), Lord Cottenham, on appeal, while recognizing a right of property in the etchings which of itself would justify the issuance of the injunction, stated, after discussing the evidence, that he was bound to assume that the possession of the etchings by the defendant had "its foundation in a breach of trust, confidence, or contract," and that upon such ground also the plaintiff's title to the injunction was fully sustained.

In *Tuck v. Priester*, 19 Q. B. D. 639 (1887), the plaintiffs were owners of a picture, and employed the defendant to make a certain number of copies. He did so, and made also a number of other copies for himself, and offered them for sale in England at a lower price. Subsequently, the plaintiffs registered their copyright in the picture, and then brought suit for an injunction and damages. The Lords Justices differed as to the application of the copyright acts to the case, but held unanimously that independently of those acts, the plaintiffs were entitled to an injunction and damages for breach of contract.

In *Pollard v. Photographic Co.*, 40 Ch. Div. 345 (1888), a photographer who had taken a lady's photograph under the ordinary circumstances was restrained from exhibiting it, and also from selling copies of it, on the ground that it was a breach of an implied term in the contract, and also that it was a breach of confidence. Mr. Justice North interjected in the argument of the plaintiff's counsel the inquiry: "Do you dispute that if the negative likeness were taken on the sly, the person who took it might exhibit copies?" and counsel for the plaintiff answered: "In that case there would be no trust or consideration to support a contract." Later, the defendant's counsel argued that "a person has no property in his own features; short of doing what is libellous or otherwise illegal, there is no restriction on the

photographer's using his negative." But the court, while expressly finding a breach of contract and of trust sufficient to justify its interposition, still seems to have felt the necessity of resting the decision also upon a right of property,¹ in order to

¹ "The question, therefore, is whether a photographer who has been employed by a customer to take his or her portrait is justified in striking off copies of such photograph for his own use, and selling and disposing of them, or publicly exhibiting them by way of advertisement or otherwise, without the authority of such customer, either express or implied. I say 'express or implied,' because a photographer is frequently allowed, on his own request, to take a photograph of a person under circumstances in which a subsequent sale by him must have been in the contemplation of both parties, though not actually mentioned. To the question thus put, my answer is in the negative, that the photographer is not justified in so doing. Where a person obtains information in the course of a confidential employment, the law does not permit him to make any improper use of the information so obtained; and an injunction is granted, if necessary, to restrain such use; as, for instance, to restrain a clerk from disclosing his master's accounts, or an attorney from making known his client's affairs, learned in the course of such employment. Again, the law is clear that a breach of contract, whether express or implied, can be restrained by injunction. In my opinion the case of the photographer comes within the principles upon which both these classes of cases depend. The object for which he is employed and paid is to supply his customer with the required number of printed photographs of a given subject. For this purpose the negative is taken by the photographer on glass; and from this negative copies can be printed in much larger numbers than are generally required by the customer. The customer who sits for the negative thus puts the power of reproducing the object in the hands of the photographer; and in my opinion the photographer who uses the negative to produce other copies for his own use, without authority, is abusing the power confidentially placed in his hands merely for the purpose of supplying the customer; and further, I hold that the bargain between the customer and the photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only." Referring to the opinions delivered in *Tuck v. Priest*, 19 Q. B. D. 639, the learned justice continued: "Then Lord Justice Lindley says: 'I will deal first with the injunction, which stands, or may stand, on a totally different footing from either the penalties or the damages. It appears to me that the relation between the plaintiffs and the defendant was such that, whether the plaintiffs had any copyright or not, the defendant has done that which renders him liable to an injunction. He was employed by the plaintiffs to make a certain number of copies of the picture, and that employment carried with it the necessary implication that the defendant was not to make more copies for himself, or to sell the additional copies in this country in competition with his employer. Such conduct on his part is a gross breach of contract and a gross breach of faith, and, in my judgment, clearly entitles the plaintiffs to an injunction, whether they have a copyright in the picture or not.' That case is the more noticeable, as the contract was in writing; and yet it was held to be an implied condition that the defendant should not make any copies for himself. The phrase 'a gross breach of faith' used by Lord Justice Lindley in that case applies with equal force to the present, when a lady's feelings are shocked by finding that the photographer she has employed to take her likeness for her own use is publicly exhibiting and selling copies thereof." *North, J., in Pollard v. Photographic Co.*, 40 Ch. D. 345, 349-352 (1888).

"It may be said also that the cases to which I have referred are all cases in which there was some right of property infringed, based upon the recognition by the law of pro-

bring it within the line of those cases which were relied upon as precedents.¹

This process of implying a term in a contract, or of implying a trust (particularly where the contract is written, and where there is no established usage or custom), is nothing more nor less than a judicial declaration that public morality, private justice, and general convenience demand the recognition of such a rule, and that the publication under similar circumstances would be considered an intolerable abuse. So long as these circumstances happen to present a contract upon which such a term can be engrafted by the judicial mind, or to supply relations upon which a trust or confidence can be erected, there may be no objection to working out the desired protection through the doctrines of contract or of trust. But the court can hardly stop there. The narrower doctrine may have satisfied the demands of society at a time when the abuse to be guarded against could rarely have arisen without violating a contract or a special

tection being due for the products of a man's own skill or mental labor; whereas in the present case the person photographed has done nothing to merit such protection, which is meant to prevent legal wrongs, and not mere sentimental grievances. But a person whose photograph is taken by a photographer is not thus deserted by the law; for the Act of 25 and 26 Vict., c. 68, s. 1, provides that when the negative of any photograph is made or executed for or on behalf of another person for a good or valuable consideration, the person making or executing the same shall not retain the copyright thereof, unless it is expressly reserved to him by agreement in writing signed by the person for or on whose behalf the same is so made or executed; but the copyright shall belong to the person for or on whose behalf the same shall have been made or executed.

"The result is that in the present case the copyright in the photograph is in one of the plaintiffs. It is true, no doubt, that sect. 4 of the same act provides that no proprietor of copyright shall be entitled to the benefit of the act until registration, and no action shall be sustained in respect of anything done before registration; and it was, I presume, because the photograph of the female plaintiff has not been registered that this act was not referred to by counsel in the course of the argument. But, although the protection against the world in general conferred by the act cannot be enforced until after registration, this does not deprive the plaintiffs of their common-law right of action against the defendant for his breach of contract and breach of faith. This is quite clear from the cases of *Morison v. Moat* [9 Hare, 241] and *Tuck v. Priest* [19 Q. B. D. 629] already referred to, in which latter case the same act of Parliament was in question." Per North, J., *ibid.* p. 352.

This language suggests that the property right in photographs or portraits may be one created by statute, which would not exist in the absence of registration; but it is submitted that it must eventually be held here, as it has been in the similar cases, that the statute provision becomes applicable only when there is a publication, and that before the act of registering there is property in the thing upon which the statute is to operate.

¹ *Duke of Queensberry v. Shebbear*, 2 Eden, 329; *Murray v. Heath*, 1 B. & Ad. 804; *Tuck v. Priest*, 19 Q. B. D. 629.

confidence; but now that modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must be placed upon a broader foundation. While, for instance, the state of the photographic art was such that one's picture could seldom be taken without his consciously "sitting" for the purpose, the law of contract or of trust might afford the prudent man sufficient safeguards against the improper circulation of his portrait; but since the latest advances in photographic art have rendered it possible to take pictures surreptitiously, the doctrines of contract and of trust are inadequate to support the required protection, and the law of tort must be resorted to. The right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolate personality, affords alone that broad basis upon which the protection which the individual demands can be rested.

Thus, the courts, in searching for some principle upon which the publication of private letters could be enjoined, naturally came upon the ideas of a breach of confidence, and of an implied contract; but it required little consideration to discern that this doctrine could not afford all the protection required, since it would not support the court in granting a remedy against a stranger; and so the theory of property in the contents of letters was adopted.¹ Indeed, it is difficult to conceive on what theory of the law the casual recipient of a letter, who proceeds to publish it, is guilty of a breach of contract, express or implied, or of any breach of trust, in the ordinary acceptance of that term. Suppose a letter has been addressed to him without his solicitation. He opens it, and reads. Surely, he has not made any contract; he has not accepted any trust. He cannot, by opening and reading

¹ See Mr. Justice Story in *Folsom v. Marsh*, 2 Story, 100, 111 (1841):—

"If he [the recipient of a letter] attempt to publish such letter or letters on other occasions, not justifiable, a court of equity will prevent the publication by an injunction, as a breach of private confidence or contract, or of the rights of the author; and *a fortiori*, if he attempt to publish them for profit; for then it is not a mere breach of confidence or contract, but it is a violation of the exclusive copyright of the writer. . . . The general property, and the general rights incident to property, belong to the writer, whether the letters are literary compositions, or familiar letters, or details of facts, or letters of business. The general property in the manuscripts remains in the writer and his representatives, as well as the general copyright. *A fortiori*, third persons, standing in no privity with either party, are not entitled to publish them, to subserve their own private purposes of interest, or curiosity, or passion."

the letter, have come under any obligation save what the law declares; and, however expressed, that obligation is simply to observe the legal right of the sender, whatever it may be, and whether it be called his right of property in the contents of the letter, or his right to privacy.¹

A similar groping for the principle upon which a wrongful publication can be enjoined is found in the law of trade secrets. There, injunctions have generally been granted on the theory of a breach of contract, or of an abuse of confidence.² It would, of course, rarely happen that any one would be in the possession of a secret unless confidence had been reposed in him. But can it be supposed that the court would hesitate to grant relief against one who had obtained his knowledge by an ordinary trespass,—for instance, by wrongfully looking into a book in which the secret was recorded, or by eavesdropping? Indeed, in *Yovatt v. Winyard*, 1 J. & W. 394 (1820), where an injunction was granted against making any use of or communicating certain recipes for veterinary medicine, it appeared that the defendant, while in the plaintiff's employ, had surreptitiously got access to his book of recipes, and copied them. Lord Eldon "granted the injunction, upon the ground of there having been a breach of trust and confidence;" but it would seem to be difficult to draw any sound legal distinction between such a case and one where a mere stranger wrongfully obtained access to the book.³

¹ "The receiver of a letter is not a bailee, nor does he stand in a character analogous to that of a bailee. There is no right to possession, present or future, in the writer. The only right to be enforced against the holder is a right to prevent publication, not to require the manuscript from the holder in order to a publication of himself." Per Hon. Joel Parker, quoted in *Grigsby v. Breckenridge*, 2 Bush. 480, 489 (1857).

² In *Morison v. Moat*, 9 Hare, 241, 255 (1851), a suit for an injunction to restrain the use of a secret medical compound, Sir George James Turner, V. C., said: "That the court has exercised jurisdiction in cases of this nature does not, I think, admit of any question. Different grounds have indeed been assigned for the exercise of that jurisdiction. In some cases it has been referred to property, in others to contract, and in others, again, it has been treated as founded upon trust or confidence,—meaning, as I conceive, that the court fastens the obligation on the conscience of the party, and enforces it against him in the same manner as it enforces against a party to whom a benefit is given, the obligation of performing a promise on the faith of which the benefit has been conferred; but upon whatever grounds the jurisdiction is founded, the authorities leave no doubt as to the exercise of it."

³ A similar growth of the law showing the development of contractual rights into rights of property is found in the law of goodwill. There are indications, as early as the Year Books, of traders endeavoring to secure to themselves by contract the advantages now designated by the term "goodwill," but it was not until 1743 that goodwill received

We must therefore conclude that the rights, so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world; and, as above stated, the principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense. The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.¹

If the invasion of privacy constitutes a legal *injuria*, the elements for demanding redress exist, since already the value of mental suffering, caused by an act wrongful in itself, is recognized as a basis for compensation.

The right of one who has remained a private individual, to prevent his public portraiture, presents the simplest case for such extension; the right to protect one's self from pen portraiture, from a discussion by the press of one's private affairs, would be a more important and far-reaching one. If casual and unimportant state-

legal recognition as property apart from the personal covenants of the traders. See Allan on Goodwill, pp. 2, 3.

¹ The application of an existing principle to a new state of facts is not judicial legislation. To call it such is to assert that the existing body of law consists practically of the statutes and decided cases, and to deny that the principles (of which these cases are ordinarily said to be evidence) exist at all. It is not the application of an existing principle to new cases, but the introduction of a new principle, which is properly termed judicial legislation.

But even the fact that a certain decision would involve judicial legislation should not be taken as conclusive against the propriety of making it. This power has been constantly exercised by our judges, when applying to a new subject principles of private justice, moral fitness, and public convenience. Indeed, the elasticity of our law, its adaptability to new conditions, the capacity for growth, which has enabled it to meet the wants of an ever changing society and to apply immediate relief for every recognized wrong, have been its greatest boast.

"I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence or the incapacity of the avowed legislator. That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislature." 1 Austin's Jurisprudence, p. 224.

The cases referred to above show that the common law has for a century and a half protected privacy in certain cases, and to grant the further protection now suggested would be merely another application of an existing rule.

ments in a letter, if handiwork, however inartistic and valueless, if possessions of all sorts are protected not only against reproduction, but against description and enumeration, how much more should the acts and sayings of a man in his social and domestic relations be guarded from ruthless publicity. If you may not reproduce a woman's face photographically without her consent, how much less should be tolerated the reproduction of her face, her form, and her actions, by graphic descriptions colored to suit a gross and depraved imagination.

The right to privacy, limited as such right must necessarily be, has already found expression in the law of France.¹

It remains to consider what are the limitations of this right to privacy, and what remedies may be granted for the enforcement of the right. To determine in advance of experience the exact line at which the dignity and convenience of the individual must yield to the demands of the public welfare or of private justice would be a difficult task; but the more general rules are furnished by the legal analogies already developed in the law of slander and libel, and in the law of literary and artistic property.

1. The right to privacy does not prohibit any publication of matter which is of public or general interest.

In determining the scope of this rule, aid would be afforded by the analogy, in the law of libel and slander, of cases which deal with the qualified privilege of comment and criticism on matters of public and general interest.² There are of course difficulties in applying such a rule; but they are inherent in the subject-matter, and are certainly no greater than those which exist in many other branches of the law,—for instance, in that large class of cases in which the reasonableness or unreasonableness of an act is made the test of liability. The design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they may

¹ *Loi Relative à la Presse*. 11 Mai 1868.

"11. Toute publication dans un écrit périodique relative à un fait de la vie privée constitue une contravention punie d'une amende de cinq cent francs.

"La poursuite ne pourra être exercée que sur la plainte de la partie intéressée."
Rivière, *Codes Français et Lois Usuelles*. App. Code Pen., p. 20.

² See *Campbell v. Spottiswoode*, 3 B. & S. 769, 776; *Henwood v. Harrison*, L. R. 7 C. P. 606; *Gott v. Pulsifer*, 122 Mass. 235.

properly prefer to keep private, made public against their will. It is the unwarranted invasion of individual privacy which is reprehended, and to be, so far as possible, prevented. The distinction, however, noted in the above statement is obvious and fundamental. There are persons who may reasonably claim as a right, protection from the notoriety entailed by being made the victims of journalistic enterprise. There are others who, in varying degrees, have renounced the right to live their lives screened from public observation. Matters which men of the first class may justly contend, concern themselves alone, may in those of the second be the subject of legitimate interest to their fellow-citizens. Peculiarities of manner and person, which in the ordinary individual should be free from comment, may acquire a public importance, if found in a candidate for political office. Some further discrimination is necessary, therefore, than to class facts or deeds as public or private according to a standard to be applied to the fact or deed *per se*. To publish of a modest and retiring individual that he suffers from an impediment in his speech or that he cannot spell correctly, is an unwarranted, if not an unexampled, infringement of his rights, while to state and comment on the same characteristics found in a would-be congressman could not be regarded as beyond the pale of propriety.

The general object in view is to protect the privacy of private life, and to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn.¹ Since, then, the propriety of publishing the very same facts may depend wholly upon the person concerning whom they are published, no fixed formula can be used to prohibit obnoxious publications. Any rule of liability adopted must have in it an elasticity which shall take account of the varying circumstances of each case, — a necessity which unfortunately renders such a doctrine not only more difficult of application, but also to

¹ "Nos mœurs n'admettent pas la prétention d'enlever aux investigations de la publicité les actes qui relèvent de la vie publique, et ce dernier mot ne doit pas être restreint à la vie officielle ou à celle du fonctionnaire. Tout homme qui appelle sur lui l'attention ou les regards du public, soit par une mission qu'il a reçue ou qu'il se donne, soit par le rôle qu'il s'attribue dans l'industrie, les arts, le théâtre, etc., ne peut plus invoquer contre la critique ou l'exposé de sa conduite d'autre protection que les lois qui repriment la diffamation et l'injure." *Circ. Mins. Just.*, 4 Juin, 1868. *Rivière Codes Français et Lois Usuelles*, App. Code Pen. 20 n (b).

a certain extent uncertain in its operation and easily rendered abortive. Besides, it is only the more flagrant breaches of decency and propriety that could in practice be reached, and it is not perhaps desirable even to attempt to repress everything which the nicest taste and keenest sense of the respect due to private life would condemn.

In general, then, the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity. The foregoing is not designed as a wholly accurate or exhaustive definition, since that which must ultimately in a vast number of cases become a question of individual judgment and opinion is incapable of such definition; but it is an attempt to indicate broadly the class of matters referred to. Some things all men alike are entitled to keep from popular curiosity, whether in public life or not, while others are only private because the persons concerned have not assumed a position which makes their doings legitimate matters of public investigation.¹

2. The right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.

Under this rule, the right to privacy is not invaded by any publication made in a court of justice, in legislative bodies, or the committees of those bodies; in municipal assemblies, or the committees of such assemblies, or practically by any communication made in any other public body, municipal or parochial, or in any body quasi public, like the large voluntary associations formed

¹ "Celui-la seul a droit au silence absolu qui n'a pas expressément ou indirectement provoqué ou autorisé l'attention, l'approbation ou le blâme." Circ. Mins. Just., 4 Juin, 1868. Rivière Codes Français et Lois Usuelles, App. Code Pen. 20 n (b).

The principle thus expressed evidently is designed to exclude the wholesale investigations into the past of prominent public men with which the American public is too familiar, and also, unhappily, too well pleased; while not entitled to the "silence *absolu*" which less prominent men may claim as their due, they may still demand that all the details of private life in its most limited sense shall not be laid bare for inspection.

for almost every purpose of benevolence, business, or other general interest; and (at least in many jurisdictions) reports of any such proceedings would in some measure be accorded a like privilege.¹ Nor would the rule prohibit any publication made by one in the discharge of some public or private duty, whether legal or moral, or in conduct of one's own affairs, in matters where his own interest is concerned.²

3. The law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage.

The same reasons exist for distinguishing between oral and written publications of private matters, as is afforded in the law of defamation by the restricted liability for slander as compared with the liability for libel.³ The injury resulting from such oral communications would ordinarily be so trifling that the law might well, in the interest of free speech, disregard it altogether.⁴

¹ *Wason v. Walters*, L. R. 4 Q. B. 73; *Smith v. Higgins*, 16 Gray, 251; *Barrows v. Bell*, 7 Gray, 331.

² This limitation upon the right to prevent the publication of private letters was recognized early:—

“But, consistently with this right [of the writer of letters], the persons to whom they are addressed may have, nay, must, by implication, possess, the right to publish any letter or letters addressed to them, upon such occasions, as require, or justify, the publication or public use of them; but this right is strictly limited to such occasions. Thus, a person may justifiably use and publish, in a suit at law or in equity, such letter or letters as are necessary and proper, to establish his right to maintain the suit, or defend the same. So, if he be aspersed or misrepresented by the writer, or accused of improper conduct, in a public manner, he may publish such parts of such letter or letters, but no more, as may be necessary to vindicate his character and reputation, or free him from unjust obloquy and reproach.” *Story, J.*, in *Folsom v. Marsh*, 2 Story, 100, 110, 111 (1841).

The existence of any right in the recipient of letters to publish the same has been strenuously denied by Mr. Drone; but the reasoning upon which his denial rests does not seem satisfactory. *Drone on Copyright*, pp. 136–139.

³ *Townshend on Slander and Libel*, 4th ed., § 18; *Odgers on Libel and Slander*, 2d ed., p. 3.

⁴ “But as long as gossip was oral, it spread, as regards any one individual, over a very small area, and was confined to the immediate circle of his acquaintances. It did not reach, or but rarely reached, those who knew nothing of him. It did not make his name, or his walk, or his conversation familiar to strangers. And what is more to the purpose, it spared him the pain and mortification of knowing that he was gossiped about. A man seldom heard of oral gossip about him which simply made him ridiculous, or trespassed on his lawful privacy, but made no positive attack upon his reputation. His peace and comfort were, therefore, but slightly affected by it.” *E. L. Godkin*, “The Rights of the Citizen: To his Reputation.” *Scribner's Magazine*, July, 1890, p. 66.

Vice-Chancellor Knight Bruce suggested in *Prince Albert v. Strange*, 2 DeGex & Sm. 652, 694, that a distinction would be made as to the right to privacy of works of art between an oral and a written description or catalogue.

4. The right to privacy ceases upon the publication of the facts by the individual, or with his consent.

This is but another application of the rule which has become familiar in the law of literary and artistic property. The cases there decided establish also what should be deemed a publication, — the important principle in this connection being that a private communication of circulation for a restricted purpose is not a publication within the meaning of the law.¹

5. The truth of the matter published does not afford a defence. Obviously this branch of the law should have no concern with the truth or falsehood of the matters published. It is not for injury to the individual's character that redress or prevention is sought, but for injury to the right of privacy. For the former, the law of slander and libel provides perhaps a sufficient safeguard. The latter implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all.²

6. The absence of "malice" in the publisher does not afford a defence.

Personal ill-will is not an ingredient of the offence, any more than in an ordinary case of trespass to person or to property. Such malice is never necessary to be shown in an action for libel or slander at common law, except in rebuttal of some defence, *e. g.*, that the occasion rendered the communication privileged, or, under the statutes in this State and elsewhere, that the statement complained of was true. The invasion of the privacy that is to be protected is equally complete and equally injurious, whether the motives by which the speaker or writer was actuated are, taken by themselves, culpable or not; just as the damage to character, and to some extent the tendency to provoke a breach of the peace, is equally the result of defamation without regard to the motives leading to its publication. Viewed as a wrong to the individual, this rule is the same pervading the whole law of torts, by which one is held responsible for his intentional acts, even though they are committed with no sinister intent; and viewed as a wrong

¹ See Drone on Copyright, pp. 121, 289, 290.

² Compare the French law.

"En prohibant l'envahissement de la vie privée, sans qu'il soit nécessaire d'établir l'intention criminelle, la loi a entendue interdire toute discussion de la part de la défense sur la vérité des faits. Le remède eut été pire que le mal, si un débat avait pu s'engager sur ce terrain." *Circ. Mins. Just.*, 4 Juin, 1868. *Rivière Code Français et Lois Usuelles*, App. Code Penn. 20 n(a).

to society, it is the same principle adopted in a large category of statutory offences.

The remedies for an invasion of the right of privacy are also suggested by those administered in the law of defamation, and in the law of literary and artistic property, namely :—

1. An action of tort for damages. in all cases.¹ Even in the absence of special damages, substantial compensation could be allowed for injury to feelings as in the action of slander and libel.

2. An injunction, in perhaps a very limited class of cases.²

It would doubtless be desirable that the privacy of the individual should receive the added protection of the criminal law, but for this, legislation would be required.³ Perhaps it would be deemed proper to bring the criminal liability for such publication within narrower limits ; but that the community has an interest in preventing such invasions of privacy, sufficiently strong to justify the introduction of such a remedy, cannot be doubted. Still, the protection of society must come mainly through a recognition of

¹ Comp. Drone on Copyright, p. 107.

² Comp. High on Injunctions, 3d ed., § 1015 ; Townshend on Libel and Slander, 4th ed., §§ 417a-417d.

³ The following draft of a bill has been prepared by William H. Dunbar, Esq., of the Boston bar, as a suggestion for possible legislation :—

“ SECTION 1. Whoever publishes in any newspaper, journal, magazine, or other periodical publication any statement concerning the private life or affairs of another, after being requested in writing by such other person not to publish such statement or any statement concerning him, shall be punished by imprisonment in the State prison not exceeding five years, or by imprisonment in the jail not exceeding two years, or by fine not exceeding one thousand dollars ; provided, that no statement concerning the conduct of any person in, or the qualifications of any person for, a public office or position which such person holds, has held, or is seeking to obtain, or for which such person is at the time of such publication a candidate, or for which he or she is then suggested as a candidate, and no statement of or concerning the acts of any person in his or her business, profession, or calling, and no statement concerning any person in relation to a position, profession, business, or calling, bringing such person prominently before the public, or in relation to the qualifications for such a position, business, profession, or calling of any person prominent or seeking prominence before the public, and no statement relating to any act done by any person in a public place, nor any other statement of matter which is of public and general interest, shall be deemed a statement concerning the private life or affairs of such person within the meaning of this act.

“ SECT. 2. It shall not be a defence to any criminal prosecution brought under section 1 of this act that the statement complained of is true, or that such statement was published without a malicious intention ; but no person shall be liable to punishment for any statement published under such circumstances that if it were defamatory the publication thereof would be privileged.”

the rights of the individual. Each man is responsible for his own acts and omissions only. If he condones what he reprobates, with a weapon at hand equal to his defence, he is responsible for the results. If he resists, public opinion will rally to his support. Has he then such a weapon? It is believed that the common law provides him with one, forged in the slow fire of the centuries, and to-day fitly tempered to his hand. The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?

Samuel D. Warren,
Louis D. Brandeis.

Boston, December, 1890.



Princeton University Press

Why Privacy is Important

Author(s): James Rachels

Source: *Philosophy & Public Affairs*, Vol. 4, No. 4 (Summer, 1975), pp. 323-333

Published by: [Blackwell Publishing](#)

Stable URL: <http://www.jstor.org/stable/2265077>

Accessed: 03/05/2011 10:02

Your use of the JSTOR archive indicates your acceptance of JSTOR's Terms and Conditions of Use, available at <http://www.jstor.org/page/info/about/policies/terms.jsp>. JSTOR's Terms and Conditions of Use provides, in part, that unless you have obtained prior permission, you may not download an entire issue of a journal or multiple copies of articles, and you may use content in the JSTOR archive only for your personal, non-commercial use.

Please contact the publisher regarding any further use of this work. Publisher contact information may be obtained at <http://www.jstor.org/action/showPublisher?publisherCode=black>.

Each copy of any part of a JSTOR transmission must contain the same copyright notice that appears on the screen or printed page of such transmission.

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.



Princeton University Press and Blackwell Publishing are collaborating with JSTOR to digitize, preserve and extend access to *Philosophy & Public Affairs*.

<http://www.jstor.org>

JAMES RACHELS

Why Privacy Is Important

According to Thomas Scanlon, the first element of a theory of privacy should be “a characterization of the special interest we have in being able to be free from certain kinds of intrusions.” Since I agree that is the right place to begin, I shall begin there. Then I shall comment briefly on Judith Jarvis Thomson’s proposals.

I

Why, exactly, is privacy important to us? There is no one simple answer to this question, since people have a number of interests that may be harmed by invasions of their privacy.

(a) Privacy is sometimes necessary to protect people’s interests in competitive situations. For example, it obviously would be a disadvantage to Bobby Fischer if he could not analyze the adjourned position in a chess game in private, without his opponent learning his results.

(b) In other cases someone may want to keep some aspect of his life or behavior private simply because it would be embarrassing for other people to know about it. There is a splendid example of this in John Barth’s novel *End of the Road*. The narrator of the story, Jake Horner, is with Joe Morgan’s wife, Rennie, and they are approaching the Morgan house where Joe is at home alone:

“Want to eavesdrop?” I whispered impulsively to Rennie. “Come on, it’s great! See the animals in their natural habitat.”

Rennie looked shocked. “What for?”

"You mean you never spy on people when they're alone? It's wonderful! Come on, be a sneak! It's the most unfair thing you can do to a person."

"You disgust me, Jake!" Rennie hissed. "He's just reading. You don't know Joe at all, do you?"

"What does that mean?"

"Real people aren't any different when they're alone. No masks. What you see of them is authentic."

. . . . Quite reluctantly, she came over to the window and peeped in beside me.

It is indeed the grossest of injustices to observe a person who believes himself to be alone. Joe Morgan, back from his Boy Scout meeting, had evidently intended to do some reading, for there were books lying open on the writing table and on the floor beside the bookcase. But Joe wasn't reading. He was standing in the exact center of the bare room, fully dressed, smartly executing military commands. About *face!* Right *dress!* 'Ten-*shun!* Parade *rest!* He saluted briskly, his cheeks blown out and his tongue extended, and then proceeded to cavort about the room—spinning, pirouetting, bowing, leaping, kicking. I watched entranced by his performance, for I cannot say that in my strangest moments (and a bachelor has strange ones) I have surpassed him. Rennie trembled from head to foot.¹

The scene continues even more embarrassingly.

(c) There are several reasons why medical records should be kept private, having to do with the consequences to individuals of facts about them becoming public knowledge. "The average patient doesn't realize the importance of the confidentiality of medical records. Passing out information on venereal disease can wreck a marriage. Revealing a pattern of alcoholism or drug abuse can result in a man's losing his job or make it impossible for him to obtain insurance protection."²

(d) When people apply for credit (or for large amounts of insurance or for jobs of certain types) they are often investigated, and the

1. John Barth, *End of the Road* (New York, 1960), pp. 57–58.

2. Dr. Malcolm Todd, President of the A.M.A., quoted in the *Miami Herald*, 26 October 1973, p. 18-A.

result is a fat file of information about them. Now there is something to be said in favor of such investigations, for business people surely do have the right to know whether credit-applicants are financially reliable. The trouble is that all sorts of other information goes into such files, for example, information about the applicant's sex-life, his political views, and so forth. Clearly it is unfair for one's application for credit to be influenced by such irrelevant matters.

These examples illustrate the variety of interests that may be protected by guaranteeing people's privacy, and it would be easy to give further examples of the same general sort. However, I do not think that examining such cases will provide a complete understanding of the importance of privacy, for two reasons.

First, these cases all involve relatively unusual sorts of situations, in which someone has something to hide or in which information about a person might provide someone with a reason for mistreating him in some way. Thus, reflection on these cases gives us little help in understanding the value which privacy has in *normal* or *ordinary* situations. By this I mean situations in which there is nothing embarrassing or shameful or unpopular in what we are doing, and nothing ominous or threatening connected with its possible disclosure. For example, even married couples whose sex-lives are normal (whatever that is), and so who have nothing to be ashamed of, by even the most conventional standards, and certainly nothing to be black-mailed about, do not want their bedrooms bugged. We need an account of the value which privacy has for us, not only in the few special cases but in the many common and unremarkable cases as well.

Second, even those invasions of privacy that *do* result in embarrassment or in some specific harm to our other interests are objectionable on other grounds. A woman may rightly be upset if her credit-rating is adversely affected by a report about her sexual behavior because the use of such information is unfair; however, she may also object to the report simply because she feels—as most of us do—that her sex-life is *nobody else's business*. This, I think, is an extremely important point. We have a "sense of privacy" which is violated in such affairs, and this sense of privacy cannot adequately be explained merely in terms of our fear of being embarrassed or disadvantaged in one of these obvious ways. An adequate account of privacy should

help us to understand what makes something "someone's business" and why intrusions into things that are "none of your business" are, as such, offensive.

These considerations lead me to suspect that there is something important about privacy which we shall miss if we confine our attention to examples such as (a), (b), (c), and (d). In what follows I will try to bring out what this something is.

II

I want now to give an account of the value of privacy based on the idea that there is a close connection between our ability to control who has access to us and to information about us, and our ability to create and maintain different sorts of social relationships with different people. According to this account, privacy is necessary if we are to maintain the variety of social relationships with other people that we want to have, and that is why it is important to us. By a "social relationship" I do not mean anything especially unusual or technical; I mean the sort of thing which we usually have in mind when we say of two people that they are friends or that they are husband and wife or that one is the other's employer.

The first point I want to make about these relationships is that, often, there are fairly definite patterns of behavior associated with them. Our relationships with other people determine, in large part, how we act toward them and how they behave toward us. Moreover, there are *different* patterns of behavior associated with different relationships. Thus a man may be playful and affectionate with his children (although sometimes firm), businesslike with his employees, and respectful and polite with his mother-in-law. And to his close friends he may show a side of his personality that others never see—perhaps he is secretly a poet, and rather shy about it, and shows his verse only to his best friends.

It is sometimes suggested that there is something deceitful or hypocritical about such differences in behavior. It is suggested that underneath all the role-playing there is the "real" person, and that the various "masks" that we wear in dealing with some people are some sort of phony disguise that we use to conceal our "true" selves from them. I take it that this is what is behind Rennie's remark, in

the passage from Barth, that, "*Real* people aren't any different when they're alone. No masks. What you see of them is authentic." According to this way of looking at things, the fact that we observe different standards of conduct with different people is merely a sign of dishonesty. Thus the cold-hearted businessman who reads poetry to his friends is "really" a gentle poetic soul whose businesslike demeanor in front of his employees is only a false front; and the man who curses and swears when talking to his friends, but who would never use such language around his mother-in-law, is just putting on an act for her.

This, I think, is quite wrong. Of course the man who does not swear in front of his mother-in-law may be just putting on an act so that, for example, she will not disinherit him, when otherwise he would curse freely in front of her without caring what she thinks. But it may be that his conception of how he ought to behave with his mother-in-law is very different from his conception of how he may behave with his friends. Or it may not be appropriate for him to swear around *her* because "she is not that sort of person." Similarly, the businessman may be putting up a false front for his employees, perhaps because he dislikes his work and has to make a continual, disagreeable effort to maintain the role. But on the other hand he may be, quite comfortably and naturally, a businessman with a certain conception of how it is appropriate for a businessman to behave; and this conception is compatible with his also being a husband, a father, and a friend, with different conceptions of how it is appropriate to behave with his wife, his children, and his friends. There need be nothing dishonest or hypocritical in any of this, and neither side of his personality need be the "real" him, any more than any of the others.

It is not merely accidental that we vary our behavior with different people according to the different social relationships that we have with them. Rather, the different patterns of behavior are (partly) what define the different relationships; they are an important part of what makes the different relationships what they are. The relation of friendship, for example, involves bonds of affection and special obligations, such as the duty of loyalty, which friends owe to one another; but it is also an important part of what it means to have a

friend that we welcome his company, that we confide in him, that we tell him things about ourselves, and that we show him sides of our personalities which we would not tell or show to just anyone.³ Suppose I believe that someone is my close friend, and then I discover that he is worried about his job and is afraid of being fired. But, while he has discussed this situation with several other people, he has not mentioned it at all to me. And then I learn that he writes poetry, and that this is an important part of his life; but while he has shown his poems to many other people, he has not shown them to me. Moreover, I learn that he behaves with his other friends in a much more informal way than he behaves with me, that he makes a point of seeing them socially much more than he sees me, and so on. In the absence of some special explanation of his behavior, I would have to conclude that we are not as close as I had thought.

The same general point can be made about other sorts of human relationships: businessman to employee, minister to congregant, doctor to patient, husband to wife, parent to child, and so on. In each case, the sort of relationship that people have to one another involves a conception of how it is appropriate for them to behave with each other, and what is more, a conception of the kind and degree of knowledge concerning one another which it is appropriate for them to have. (I will say more about this later.) I do not mean to imply that such relationships are, or ought to be, structured in exactly the same way for everyone. Some parents are casual and easy-going with their children, while others are more formal and reserved. Some doctors want to be friends with at least some of their patients; others are businesslike with all. Moreover, the requirements of social roles may vary from community to community—for example, the role of wife may not require exactly the same sort of behavior in rural Alabama as it does in New York or New Guinea. And, the requirements of social roles may change: the women's liberation movement is making an attempt to redefine the husband-wife relationship. The examples that I have been giving are drawn, loosely speaking, from contemporary American society; but this is mainly a matter of convenience. The only point that I want to insist on is that *however* one

3. My view about friendship and its relation to privacy is similar to Charles Fried's view in his book *An Anatomy of Values* (Cambridge, Mass., 1970).

conceives one's relations with other people, there is inseparable from that conception an idea of how it is appropriate to behave with and around them, and what information about oneself it is appropriate for them to have.

The point may be underscored by observing that new types of social institutions and practices sometimes make possible new sorts of human relationships, which in turn make it appropriate to behave around people, and to say things in their presence, that would have been inappropriate before. "Group therapy" is a case in point. Many psychological patients find the prospect of group therapy unsettling, because they will have to speak openly to the group about intimate matters. They sense that there is something inappropriate about this: one simply does not reveal one's deepest feelings to strangers. Our aspirations, our problems, our frustrations and disappointments are things that we may confide to our husbands and wives, our friends, and perhaps to some others—but it is out of the question to speak of such matters to people that we do not even know. Resistance to this aspect of group therapy is overcome when the patients begin to think of each other not as strangers but as *fellow members of the group*. The definition of a kind of relation between them makes possible frank and intimate conversation which would have been totally out of place when they were merely strangers.

All of this has to do with the way that a crucial part of our lives—our relations with other people—is organized, and as such its importance to us can hardly be exaggerated. Thus we have good reason to object to anything that interferes with these relationships and makes it difficult or impossible for us to maintain them in the way that we want to. Conversely, because our ability to control who has access to us, and who knows what about us, allows us to maintain the variety of relationships with other people that we want to have, it is, I think, one of the most important reasons why we value privacy.

First, consider what happens when two close friends are joined by a casual acquaintance. The character of the group changes; and one of the changes is that conversation about intimate matters is now out of order. Then suppose these friends could *never* be alone; suppose there were always third parties (let us say casual acquaintances or strangers) intruding. Then they could do either of two things. They

could carry on as close friends do, sharing confidences, freely expressing their feelings about things, and so on. But this would mean violating their sense of how it is appropriate to behave around casual acquaintances or strangers. Or they could avoid doing or saying anything which they think inappropriate to do or say around a third party. But this would mean that they could no longer behave with one another in the way that friends do and further that, eventually, they would no longer *be* close friends.

Again, consider the differences between the way that a husband and wife behave when they are alone and the way they behave in the company of third parties. Alone, they may be affectionate, sexually intimate, have their fights and quarrels, and so on; but with others, a more "public" face is in order. If they could never be alone together, they would either have to abandon the relationship that they would otherwise have as husband and wife or else behave in front of others in ways they now deem inappropriate.⁴

These considerations suggest that we need to separate our associations, at least to some extent, if we are to maintain a system of different relationships with different people. Separation allows us to behave with certain people in the way that is appropriate to the sort of relationship we have with them, without at the same time violating our

4. I found this in a television program-guide in the *Miami Herald*, 21 October 1973, p. 17:

"I think it was one of the most awkward scenes I've ever done," said actress Brenda Benet after doing a romantic scene with her husband, Bill Bixby, in his new NBC-TV series, "The Magician."

"It was even hard to kiss him," she continued. "It's the same old mouth, but it was terrible. I was so abnormally shy; I guess because I don't think it's anybody's business. The scene would have been easier had I done it with a total stranger because that would be real acting. With Bill, it was like being on exhibition."

I should stress that, on the view that I am defending, it is *not* "abnormal shyness" or shyness of any type that is behind such feelings. Rather, it is a sense of what is appropriate with and around people with whom one has various sorts of personal relationships. Kissing *another actor* in front of the camera crew, the director, and so on, is one thing; but kissing *one's husband* in front of all these people is quite another thing. What made Ms. Benet's position confusing was that her husband *was* another actor, and the behavior that was permitted by the one relationship was discouraged by the other.

sense of how it is appropriate to behave with, and in the presence of, others with whom we have a different kind of relationship. Thus, if we are to be able to control the relationships that we have with other people, we must have control over who has access to us.

We now have an explanation of the value of privacy in ordinary situations in which we have nothing to hide. The explanation is that, even in the most common and unremarkable circumstances, we regulate our behavior according to the kinds of relationships we have with the people around us. If we cannot control who has access to us, sometimes including and sometimes excluding various people, then we cannot control the patterns of behavior we need to adopt (this is one reason why privacy is an aspect of liberty) or the kinds of relations with other people that we will have. But what about our feeling that certain facts about us are "simply nobody else's business"? Here, too, I think the answer requires reference to our relationships with people. If someone is our doctor, then it literally is his business to keep track of our health; if someone is our employer, then it literally is his business to know what salary we are paid; our financial dealings literally are the business of the people who extend us credit; and so on. In general, a fact about ourselves is someone's business if there is a specific social relationship between us which entitles them to know. We are often free to choose whether or not to enter into such relationships, and those who want to maintain as much privacy as possible will enter them only reluctantly. What we cannot do is accept such a social role with respect to another person and then expect to retain the same degree of privacy relative to him that we had before. Thus, if we are asked how much money we have in the bank, we cannot say, "It's none of your business," to our banker, to prospective creditors, or to our spouses, because their relationships with us do entitle them to know. But, at the risk of being boorish, we could say that to others with whom we have no such relationship.

III

Thomson suggests, "as a simplifying hypothesis, that the right to privacy is itself a cluster of rights, and that it is not a distinct cluster of rights but itself intersects with the cluster of rights which the

right over the person consists of, and also with the cluster of rights which owning property consists of." This hypothesis is "simplifying" because it eliminates the right to privacy as anything distinctive.

"The right over the person" consists of such "un-grand" rights as the right not to have various parts of one's body looked at, the right not to have one's elbow painted green, and so on. Thomson understands these rights as analogous to property rights. The idea is that our bodies are *ours* and so we have the same rights with respect to them that we have with respect to our other possessions.

But now consider the right not to have various parts of one's body looked at. Insofar as this is a matter of *privacy*, it is not simply analogous to property rights; for the kind of interest we have in controlling who looks at what parts of our bodies is very different from the interest we have in our cars or fountain pens. For most of us, physical intimacy is a part of very special sorts of personal relationships. Exposing one's knee or one's face to someone may not count for us as physical intimacy, but exposing a breast, and allowing it to be seen and touched, does. Of course the details are to some extent a matter of social convention; that is why it is easy for us to imagine, say, a Victorian woman for whom an exposed knee would be a sign of intimacy. She would be right to be distressed at learning that she had absent-mindedly left a knee uncovered and that someone was looking at it—if the observer was not her spouse or her lover. By dissociating the body from ideas of physical intimacy, and the complex of personal relationships of which such intimacies are a part, we can make this "right over the body" seem to be nothing more than an un-grand kind of property right; but that dissociation separates this right from the matters that make *privacy* important.

Thomson asks whether it violates your right to privacy for acquaintances to indulge in "very personal gossip" about you, when they got the information without violating your rights, and they are not violating any confidences in telling what they tell. (See part VIII, case (e), in Thomson's paper.) She thinks they do not violate your right to privacy, but that if they do "there is trouble for the simplifying hypothesis."

This is, as she says, a debatable case, but if my account of why privacy is important is correct, we have at least some reason to think

that your right to privacy can be violated in such a case. Let us fill in some details. Suppose you are recently divorced, and the reason your marriage failed is that you became impotent shortly after the wedding. You have shared your troubles with your closest friend, but this is not the sort of thing you want everyone to know. Not only would it be humiliating for everyone to know, it is none of their business. It is the sort of intimate fact about you that is not appropriate for strangers or casual acquaintances to know. But now the gossips have obtained the information (perhaps one of them innocently overheard your discussion with your friend; it was not his fault, so he did not violate your privacy in the hearing, but then you did not know he was within earshot) and now they are spreading it around to everyone who knows you and to some who do not. Are they violating your right to privacy? I think they are. If so, it is not surprising, for the interest involved in this case is just the sort of interest which the right to privacy typically protects. Since the right that is violated in this case is not also a property right, or a right over the person, the simplifying hypothesis fails. But this should not be surprising, either, for if the right to privacy has a different *point* than these other rights, we should not expect it always to overlap with them. And even if it did always overlap, we could still regard the right to privacy as a distinctive sort of right in virtue of the special kind of interest it protects.

Protecting Privacy in an Information Age: The Problem of Privacy in Public

Author(s): Helen Nissenbaum

Source: *Law and Philosophy*, Vol. 17, No. 5/6 (Nov., 1998), pp. 559-596

Published by: [Springer](#)

Stable URL: <http://www.jstor.org/stable/3505189>

Accessed: 03/05/2011 10:10

Your use of the JSTOR archive indicates your acceptance of JSTOR's Terms and Conditions of Use, available at <http://www.jstor.org/page/info/about/policies/terms.jsp>. JSTOR's Terms and Conditions of Use provides, in part, that unless you have obtained prior permission, you may not download an entire issue of a journal or multiple copies of articles, and you may use content in the JSTOR archive only for your personal, non-commercial use.

Please contact the publisher regarding any further use of this work. Publisher contact information may be obtained at <http://www.jstor.org/action/showPublisher?publisherCode=springer>.

Each copy of any part of a JSTOR transmission must contain the same copyright notice that appears on the screen or printed page of such transmission.

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.



Springer is collaborating with JSTOR to digitize, preserve and extend access to *Law and Philosophy*.

HELEN NISSENBAUM

PROTECTING PRIVACY IN AN INFORMATION AGE: THE
PROBLEM OF PRIVACY IN PUBLIC

INTRODUCTION

There is growing awareness as well as resentment of the routine practice of recording, analyzing, and communicating information about individuals as they act and transact in the normal course of their commercial and public lives. The information in question is taken into the possession of and used by whomever collects it and from there may be transmitted – usually electronically, usually for fee or favor – to others – second parties, third parties, fourth parties, and so on. While philosophical theories have long acknowledged the relationship between privacy and information about persons, and have argued for limits on allowable practices of information gathering, analyzing, and sharing as a means of protecting privacy, their efforts have primarily applied to intimate and sensitive information.

While not denying the importance of protecting intimate and sensitive information, this paper insists that theories of privacy should also recognize the systematic relationship between privacy and information that is neither intimate nor sensitive and is drawn from public spheres. The significance of this information for privacy has emerged in recent decades as a result of contemporary surveillance practices enabled by advances in information technology, creating what I here call the problem of privacy in public.² As

¹ I am grateful to many colleagues who generously contributed to this paper with excellent comments and suggestions: Phil Agre, Judith Wagner DeCew, Jodi Halpern, David Heyd, Jerry Kang, John Kleinig, Gary Marx, David Orentlicher, Kristen Shrader-Frechette, Jeroen van den Hoven, and Tom Vogt. I am also indebted to anonymous reviewers for *Law and Philosophy* for careful reading and several wise suggestions.

² Anita Allen recently drew my attention to a discussion in Allen, A., *Uneasy Access* (Totowa, New Jersey: Rowman & Littlefield, 1988), Chapter 5, in which



observed in 1985 by Larry Hunter, a computer scientist, "Our revolution will not be in gathering data – don't look for TV cameras in your bedroom – but in analyzing the information that is already willingly shared."³

In the course of this paper I will argue that privacy in public, which in the past has been explicitly excluded or merely neglected by many of the most highly-regarded and often-cited philosophical and legal works on privacy, is a genuine privacy interest that is worthy of study as well as protection.

The discussion proceeds as follows. After surveying circumstances and activities that give rise to the problem of privacy in public, I offer an explanation for why predominant and influential theoretical accounts of privacy have failed to deal explicitly with it. Following this, in what may be seen as the core of the paper, I identify the features of contemporary surveillance practices that are central to viewing these practices as genuine concerns for any normative theory of privacy. In the concluding sections of the paper, I consider how we may absorb privacy in public into comprehensive theories of privacy. Although I do not provide such a theory myself, I suggest that resources are already present in some existing theories – for example, in work by Ferdinand Schoeman and, more recently, by Judith DeCew.⁴ I also clear the way for such a theory by showing how certain barriers that, in the past, have seemed insurmountable may be overcome.

she discusses whether, and when, it is reasonable to expect that privacy will be respected in public spaces. She argues that even in public places like hiking trails, subway cars, or bars, people ought to be free of invasive surveillance. She also considers sexual harassment in public spaces and the public display of pornography to be activities that violate privacy in public. Also, see Helen Nissenbaum, "Toward an approach to privacy in public: the challenges of information technology," *Ethics and Behavior* 7 (3) (1997), pp. 207–219, where I introduce the concept of privacy in public.

³ Larry Hunter, "Public Image," *Whole Earth Review* (January, 1985). Reprinted in Deborah Johnson and Helen Nissenbaum, *Computers, Ethics, and Social Values* (Englewood Cliffs: Prentice Hall, 1995), p. 294.

⁴ In their various writings but see, especially, Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (Ithaca: Cornell University Press, 1997) and Ferdinand Schoeman, *Privacy and Social Freedom* (Cambridge: Cambridge University Press, 1992).

I. THE PROBLEM OF PRIVACY IN PUBLIC

My interest in the problem of protecting privacy in public is motivated by circumstances in the real world that are obviously problematic for most people, and have frequently been reported in public and popular mass media.⁵ These circumstances are that even, and especially, in the public arena, people have become targets of surveillance at just about every turn of their lives. In transactions with retailers, mail order companies, medical care givers, daycare providers, and even beauty parlors, information about them is collected, stored, analyzed and sometimes shared. Their presence on the planet, their notable features and all their momentous milestones are dutifully recorded by agencies of federal, state and local government including birth, marriage, divorce, property ownership, driver's licenses, vehicle registration, moving violations, parenthood, and, finally, their demise. Into the great store of information, people are identified through name, address, phone number, credit card numbers, social security number, passport number, and more; they are described by age, hair color, eye color, height, quality of vision, mail orders and on site purchases, credit card activity, travel, employment history, rental history, real estate transactions, change of address,⁶ ages and numbers of children, and magazine subscriptions.⁷ The dimensions are endless.

In several ways, information technology is essentially implicated in this relentless gathering of information. In the first place, computerized databases have provided for it the right kind of home. Information that is drawn from the physical world is harbored

⁵ For example, see "Goals Clash in Shielding Privacy," *The New York Times*, October 28, 1997, "In Prison, Free to Get Information," *The New York Times*, October 20, 1997, "On Line, High-Tech Sleuths Find Private Facts," *The New York Times*, September 15, 1997, *No More Privacy: All About You*, Films for the Humanities and Sciences, Inc., Princeton: 1993. "The Death of Privacy," *Time*, August 25, 1997, Col. 150 No. 8.

⁶ H. Jeff Smith, in *Managing Privacy: Information Technology and Corporate America* (Chapel Hill: The University of North Carolina Press, 1994), reports that post offices release lists to owners of target marketing consisting of the names and addresses of individuals who complete National Change of Address cards.

⁷ Molecular biologists predict that one day, in the not too distant future, a computer chip will be capable of recording each individual's complete DNA sequence in something analogous to a bar-code.

in electronic databases, which give these records the permanence, malleability and transportability that has become the trademark of information technology. Without information technology, the gatherers and users of information would be able neither to conduct surveillance (that is, gather the data), nor create databases of great magnitude and power, nor extract the information that motivates these activities. Roughly forty years ago, this application of information technology to the creation of computerized databases mainly by government and other large organizations, was the first to attract concern among policy analysts, journalists and fiction writers.

In the unfolding of recent developments in information technology, and especially comprehensive digital electronic networks, there is another means by which information may be harvested. In contemporary, technologically advanced societies, it is commonplace for large sectors of populations to participate, in varying degrees, in electronically networked interactions. Governments, as well as individual and institutional agents of the private sector, encourage such participation by their explicit expressions of approval, by progressively increasing the ease of access, as well as speed and declining prices (for example, through the World Wide Web), and at the same time creating the possibility for more and more to be done by electronic means. Once in the electronic sphere, the tracks of people's activities may be recorded directly into electronic databases. Electronic transactions, even carefree meanderings (popularly referred to as "browsing" and "surfing") may be captured and recorded.⁸ Information like email addresses, system characteristics, and a trail of network-based activities are not only effortlessly recorded, but easily combined with information from the physical world. In this activity information technology is doubly implicated

⁸ One of the devices for doing so, affectionately called "cookies", is coming under fire from perspectives both of security and privacy. Cookies are small programs that are transmitted from one site to another (usually from a web page to a web browser) for the purpose of conveying information about a user's system configuration, usage information, as well as other information that a user voluntarily provides to the cookie.

as it acts as the medium for transactions as well as repository for the information.⁹

In addition to these two means by which information technology facilitates surveillance, there is yet another layer of surveillance that builds upon them. Where most of the activities earlier described involved the collecting of information by an agency, organization, or individual with whom a person interacts directly, this new layer involves secondary users and suppliers who acquire information from other sources, either the primary sources or other secondary sources. These secondary, or second-order purveyors of information include credit bureaus – and the so-called “super-bureaus” – medical insurance bureaus, and list brokers.¹⁰ Although some of the information supplied to agents of secondary collection is drawn from the private sector, including banks, credit card companies, and retailers, much is drawn from government records. No longer is it necessary to send a person to a court house to copy these records, painstakingly, into databases.

The electronic format offers great convenience and flexibility; databases may be searched for individual records or entire databases may be transferred via digital electronic networks. Some government agencies are fast understanding that their computerized records may be a source of significant revenue.¹¹ But even when they have balked at the idea of releasing information electronically, courts have forced them to do so.¹² Secondary harvesting of information is held deeply under suspicion not only because it is seen as the significant driver of the unquenchable thirst for information about persons as well as its seemingly endless supply, but also because people perceive it to be illegitimate. This uncontrolled harvesting of public information has not escaped the notice of scholars and advocates of policy, who consider it a serious problem for

⁹ Partly because of this, the battle over encryption is so hard fought, with privacy advocates arguing that access to the full capabilities of encryption should be available to individuals.

¹⁰ For example, TRW Credit Data, Equifax and Trans Union, the three major (super) credit bureaus.

¹¹ See Iver Peterson, “Public Information, Business Rates: State Agencies Turn Data Base Record Into Cash Cows,” *The New York Times*, July 14, 1997.

¹² *Higg-A-Rella, Inc. v. County of Essex*; 141 N.J. 35 (1985).

privacy that public as well as corporate policy has not adequately addressed.

Although the privacy concerns of data subjects have not been completely ignored in the policy arena, they are more often noticed as a result of a highly publicized media event than as a result of thoughtful public deliberation over the need for privacy. A case in point is the Video Privacy Protection Act (known commonly as the "Bork Bill"). When a national newspaper published the video rental records of Robert Bork during Senate Hearings for his nomination as Associate Justice for the Supreme Court, congress hastily responded with the Video Privacy Act.¹³ The result is a body of policy that is piecemeal and inconsistent.¹⁴

As disturbing as the practices of public surveillance are, they seem to fall outside the scope of predominant theoretical approaches to privacy, which have concerned themselves primarily with two aspects of privacy – namely, maintaining privacy against intrusion into the intimate, private realms, and protecting the privacy of individuals against intrusion by agents of government. Philosophical and legal theories of privacy offer little by way of an explicit justificatory framework for dealing with the problem of privacy in public. Indeed, with only a few exceptions, work within these traditions appears to suffer a theoretical blind spot when it comes to privacy in public, for while it has successfully advanced our understanding of the moral basis for privacy from some of the traditionally conceived threats, such as violation of the personal sphere, abuse of intimate information, protection of the private individual against government intrusion, and protection of, say doctor-patient, lawyer-

¹³ In *Managing Privacy*, H. Jeff Smith describes a parallel situation in the business world where corporate policy on privacy is fragmented and not always internally consistent. One company's privacy policies, usually devised in isolation from those of other companies, may differ enormously in what they allow and disallow with the information they gather. They frequently do not admit to being driven by any underlying "right to privacy," but prefer to portray their policies as being driven by prudence and public perception. Corporations continue to resist public policy that would impose governmental regulation on their use of information about persons.

¹⁴ See Smith, *Managing Privacy*, and Priscilla M. Regan, *Legislating Privacy: Technology, Social Values and Public Policy* (Chapel Hill: The University of North Carolina Press, 1995).

client and similar special relationships, it has not kept abreast of the privacy issues that have developed in the wake of advanced uses of information technology.

Although Hunter, in the passage quoted earlier, may have understated the extent to which the sheer growth in data gathering affects privacy and the extent to which technological means allows intrusion into and surveillance of even private, enclosed spaces,¹⁵ he accurately predicted not only that *analysis* of information will be a major source of privacy invasion, but that because the information analyzed is willingly shared, people are, in some sense, complicit in the violation of their own privacy. Accordingly, although the traditional topics covered by philosophical discussions remain important both for their historical significance and their present urgency and seriousness, they no longer cover the full extent of a need for privacy protection in our information age where the practice of public surveillance, record keeping, and information analysis seems to be growing not only without apparent limit but so completely out of the control of those who are its subjects.

This paper's emphasis on theoretical and conceptual foundations of privacy – not public or business policy – does not preclude consideration of important practical implications. In particular, I would suggest that the absence of a clearly articulated philosophical base is not of theoretical interest only, but is at least partially responsible for the inconsistencies, discontinuities and fragmentation, and incompleteness in the framework of legal protections and in public and corporate policy. It may be useful to consider the practical import of an inadequately developed conceptual scheme in terms of an actual case – the case of Lotus Marketplace.

In April 1990, Lotus Development Corporation, a developer and marketer of popular software, and Equifax Inc., one of the "big three" companies that collect and sell information about consumer financial transactions,¹⁶ announced their intention to produce a database called "Lotus Marketplace: Households" which would contain actual and inferred information about approximately 120 million individuals in the United States. It would include name, address, type of dwelling, marital status, gender, age, household income,

¹⁵ In legal terms, what may be referred to as a person's "curtilage".

¹⁶ The other two are TRW and Trans Union Credit Information.

lifestyle, and purchasing propensity. The two companies expected the database, which was to have been recorded and sold in the format of a CD-ROM, to be widely adopted by marketers and mailing companies.¹⁷ Grassroots opposition, including an estimated 30,000 letters of protest, led company executives to announce, in January 1991, that they were canceling the project. Even as privacy advocates and individual participants trumpeted victory for privacy, executives insisted that their actions were prompted only by negative publicity and public misunderstanding and not by a conviction of wrongdoing. They insisted that their product would not have violated privacy.

Though hailed as a victory for privacy, the legacy of Lotus Marketplace Households for the course of data gathering has been negligible; current practices far surpass it in scope and magnitude. This result suggests that in the absence of well understood and clearly articulated normative principles, the decision to withdraw Lotus Marketplace Households, by itself, provides a scant basis for dealing with subsequent challenges.¹⁸ There was no common agreement that here was an effort that violated privacy, or an understanding of the reasons why it violated privacy. The same may be said for the other individual victories that the dogged efforts of policy advocates have yielded. With no underlying thread to tie one effort to another, each must be fought on its own terms; the fate of privacy in public remains in the hands of those with the most energy and with the strongest lobbies; it does not reflect underlying values at all.

II. WHY PRIVACY IN PUBLIC IS DISMISSED

Before responding directly to the challenge of producing principles by which Lotus Marketplace Households and similar efforts may be judged violations of privacy, I consider the reasons why many influential philosophical theories of privacy may not have addressed

¹⁷ Other industry analysts were also very encouraging. An interesting example is Esther Dyson, now head of the Electronic Frontier Foundation, in "Data is Dandy," *Forbes* (April, 1990), p. 180.

¹⁸ Helen Nissenbaum, "Toward an Approach to Privacy in Public: Challenges of Information Technology".

directly the cluster of issues raised by widespread public surveillance. If privacy in public *does* constitute a genuine privacy interest, then not only is it important to construct the much needed justificatory framework, but also to ask why philosophical and normative theories of privacy have either explicitly dismissed the idea of any genuine privacy interest in public, or merely have overlooked it.¹⁹

A variety of factors have shaped normative theories of privacy, making them more responsive to some types of problems and constraints and less responsive to others. Examining these theories with a view to understanding why specifically they either neglect or dismiss the normative force of privacy in public, three factors (there may be others) emerge, which I have labeled, respectively, conceptual, normative, and empirical.

Conceptual

To many, the idea that privacy may be violated in public has an oddly paradoxical ring. One likely source of this response is the way the terms “public” and “private” have been used in political and legal theory. Although their respective meanings may vary from one context to another (and I take it this assertion is relatively uncontroversial among scholars in these areas), the terms are almost always used as a way to demarcate a strict dichotomy of realms.²⁰ In some contexts, for example, the term “private” indicates the realm of familial and other personal or intimate relations, while the term “public” indicates the civic realm or realm of community outside

¹⁹ I should qualify. First, there are elements in existing theories, even those that do not directly address the problem of privacy in public, that I will show are relevant to it. Second, several writers have written about privacy in ways that overlap with my concern with “privacy in public.” As mentioned earlier, these include Ferdinand Schoeman and Judith DeCew. Specific references to their works are given in subsequent footnotes.

²⁰ I do not mean to suggest that there is universal agreement among scholars either about the strictness of the dichotomy or the meaning of the respective concepts. Stanley J. Benn and Gerald F. Gauss (eds.), *Public and Private in Social Life* (London and Canberra: St. Martin’s Press, 1983), suggest that although the concepts of private and public serve to organize norms of access, agency and interest, the dichotomy is not as clear and consistent as some would have us believe. For example, a context can be conceived as both public and private: for example, a living room in a house is considered private in relation to the outside, but public in relation to bedrooms in the house.

of this personal one. In some contexts, “public” indicates the realm of governmental institutions in contrast with the realm of “private” citizens or “private” institutions (such as corporations). In relation to law, the term “private” generally marks a distinctive area dedicated to settling scores between people in their capacities as private citizens, in contrast with “public” law, which generally covers disputes in which officials or agencies of government are involved. In a similar vein Judith W. DeCew observes,

The public/private distinction has sometimes been taken to reflect differences between the appropriate scope of government, as opposed to self-regulation by individuals. It has also been interpreted to differentiate political and domestic spheres of life. These diverse linguistic descriptions capture overlapping yet nonequivalent concepts. Nevertheless they share the assumption that there is a boundary marking off that which is private from that which is public.²¹

For the majority of theorists, it follows seamlessly that the concept and value of privacy corresponds with, or applies to, the sphere of the private alone. In the past few decades, therefore, the issues most vigorously pursued in philosophical and legal work on privacy, the defenses of privacy most thoroughly articulated, are remarkably consonant with these dichotomies – as I briefly illustrate below.

Following the lines of the private/public dichotomy as it identifies distinctive realms of individual citizens and private sector institutions versus governmental agents and institutions, there is a substantial body of work by philosophers, as well as legal and political theorists, scholars and advocates of policy, and novelists, who have viewed privacy as an effective way to keep government out of the lives of private individuals and institutions. Historically, this impulse has made perfect sense in light of government’s enthusiasm for using computerized databases as a means of storing records of information about people. Certainly government had the resources and manpower as well as the need to apply the power of computing to the substantial corpus of personal information that it routinely collects.²² In 1965, when, in the name of efficiency and efficacy, the

²¹ Judith DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology*, p. 10.

²² David Heyd pointed out to me, the word “statistics” is derived from the word “state”. Government involvement in the practice of collecting information about populations, such as in census-taking, goes back many centuries, and is

Social Science Research Council, proposed a Federal Data Center to coordinate government statistical information, critics were immediately alert to the political and personal threat implicit in this proposal.²³

A great deal of the research and scholarship on privacy that immediately followed this period focused on privacy as a means of maintaining the traditionally valued balance of power between government and private individuals. This work connects the concept and value of privacy with the considerable body of theoretical work on the relationship of individuals in political society to government. It has been able to promote the value of privacy by showing that privacy is an important means by which individuals may sustain power, liberty, and autonomy against potentially overwhelming forces of government. Being able to draw on traditional thinking about the balance of power, has helped advocates and scholars gain support for public policy to constrain and control government record-keeping practices. Powerful fictional images such as Big Brother, developed in George Orwell's novel *1984*, together with observed experiences of life under totalitarian regimes, have lent credence to the practical efforts of privacy advocates.

In parallel with the private/public dichotomy that marks distinct realms of the intimate or sensitive, on the one hand, and the non-intimate, on the other, there is a considerable body of work by philosophers and others argues for protection of intimate and sensitive realms against intrusion by government or any other individual or collective agent. This work assumes the existence of distinctive realms of the personal, familial, and intimate, on the one hand, contrasted with the public, on the other. Scholars interested in this form of privacy protection emphasize the importance of a realm to which people may go, from which others are excluded. They

even discussed in the Bible. Alan Westin, *Privacy and Freedom* (New York: Atheneum, 1965), Priscilla Regan, *Legislating Privacy*, and Kenneth Laudon, *Dossier Society: Value Choices in the Design of National Information Systems* (New York: Columbia University Press: 1986) all discuss aspects of privacy protection against government intrusion.

²³ See Priscilla Regan, *Legislating Privacy: Technology, Social Values, and Public Policy*, for an excellent discussion of privacy policy. Regan pinpoints the SSRC's 1965 proposal as a key point in the history of privacy policy with respect to records of information about people.

conceive of this realm in terms of a secure physical space, in terms of a private psychological space, or even in terms of a class of information that is sensitive or intimate over which one would have supreme control.

Those who emphasize the importance of an intimate zone or sphere would say that defending the integrity of this private realm is a means of enhancing other goods, such as autonomy, liberty, personal relationships, and trust. Defenders suggest these goods may be either necessarily or empirically dependent on an individual's having sovereignty over an intimate realm.²⁴ Thus, theorists invest privacy with value by showing that privacy preserves these universally recognized values.

In this section, I have tried to show that the dichotomy between private and public naturally leads to certain lines of inquiry into privacy. While the dichotomy between public and private has yielded some important insights into the role and value of privacy, it has diverted attention from others. It does so by establishing conceptual categories that are not only hard to bridge but carry with them the implication that privacy is an interest we need protect in the private realm alone and, by implication, that privacy in public makes little sense at all. To the extent that a public-private dichotomy drives the direction of theory and policy, it naturally leads to a concentration on the private sphere alone and – mistakenly, I think – has made the idea of privacy in public seem paradoxical.

Normative

If conceptions of the public-private dichotomy have implicitly or explicitly affected the agenda for privacy theory by placing some issues in the limelight and others backstage, modes of normative argumentation have lent plausibility to certain dimensions of the privacy interest while seeming to expose others as indefensible. Claims for the protection of privacy in public have fallen into the second category as they have appeared fatally vulnerable to a

²⁴ Julie Innes in her book, *Privacy, Intimacy and Isolation* (New York and Oxford: Oxford University Press, 1992) articulates one such view of privacy in which intimacy is a defining characteristic. Also, see Nissenbaum, "An Approach to Privacy In Public," for a fuller discussion of approaches to privacy that have focused on privacy as a protection for the intimate realm.

persistent and apparently “knock-down” objection which refers to overriding competing interests. How so?

It is common for theorists and advocates of privacy to agree that while privacy is an important interest it must be balanced against other, competing interests. (This strategy is, of course, not unique to privacy.) While theorists, in their distinctive ways, have argued that privacy ought to be protected, they have understood that protecting privacy for one person inevitably leads to restraints on the freedom of another or others, or may even result in harms to them. Even those generally sympathetic to the idea of a moral right to privacy have been ready to moderate the exercise of this right in light of some of these competing claims. Privacy in public is frequently a victim of such balancing as it regularly succumbs to the apparently overwhelming weight of competing interests.

A crisp version of this objection may be found in Jeffrey Reiman's paper, “Privacy, Intimacy and Personhood.”²⁵ Reiman, who characterizes privacy as a social practice involving “a complex of behaviors that stretches from refraining from asking questions about what is none of one's business to refraining from looking into open windows one passes on the street”²⁶ and who argues that privacy is essential for the formation of a conception of the self, nevertheless concedes that the social practice of privacy “does not assert the right never to be seen even on a crowded street.”²⁷ This concession, in one form or another, is at bottom of the persistent normative objection that has so effectively blocked attempts to protect privacy in public.

The power of this widely used rejoinder rests in a foundation of considerations that have been intuitively compelling to many. One is that claims in favor of privacy in public affect information that is ostensibly innocuous, namely, information we would not normally judge to be sensitive or intimate. This being so, it does not take much for a person's claim to privacy with respect to this information to be outweighed by countervailing claims, even ones that themselves are not terribly weighty. Another consideration is that if people make

²⁵ Jeffrey Reiman, “Privacy, Intimacy and Personhood,” *Philosophy & Public Affairs* 6 (1) (1976), pp. 26–44

²⁶ Reiman, “Privacy, Intimacy and Personhood,” pp. 43–44.

²⁷ Reiman, “Privacy, Intimacy and Personhood,” p. 44.

no effort to cover, hide, or remove themselves, or information about themselves, from public view, if they willingly yield information into the public domain, then they have "let the cat out of the bag." It is unreasonable of them to think that, having let the information out, they can subsequently shift course and "get it" back, suppress it.²⁸ If, for example, you stroll downtown wearing a red sweater, then you have freely exposed the information that you were wearing a red sweater at a certain time and date. It is unreasonable to expect that this information may later be suppressed.

Not only is this unreasonable, but it is wrong because it imposes an unacceptable restraint on the freedom of others. If you have chosen to expose yourself and information about yourself in public view with the result that others have access to you, or to information about you without intruding upon your private realm, then any restrictions on what they may observe, record and do with this information cannot be justified. In the case of your red sweater, you could not, for example, expect others to avert their gaze so as not to see what you were wearing. You could not stop them remembering what you were wearing, nor prevent them from telling others about it. Such requirements would amount to an excessive restraint on the freedoms of others to observe, speak (about your red sweater), and possibly even profit from so doing. Applying the relevant phrase in legal discourse, a critic might say that because in a public area we have no "reasonable expectation of privacy," we have no right to limit access of others to the information we there expose.

These considerations have held enormous power in theoretical discussions of privacy and, to my knowledge, have rarely been directly challenged.²⁹ In Charles Fried's influential paper on privacy, for example, although he defends a robust moral and legal right to privacy, he is equally explicit about its limits. On the one hand he argues that a right to privacy, a right to control information about oneself, ought to be secured through law because: "By using the public, impersonal and ultimate institution of law

²⁸ The idea behind trade secrets is similar. A secret earns legal protection only if owners take adequate measures to keep it out of the public eye.

²⁹ Again, Schoeman, discussed later, is a notable exception. Also see Jeffrey Reiman, "Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future," *Santa Clara Computer and High Technology Law Journal* (Volume 11, Number 1, March 1995).

to grant persons this control, we at once put the right to control as far beyond question as we can and at the same time show how seriously we take that right.”³⁰ On the other hand, although a right to privacy would be recognized by law, it would extend only over a limited, conventionally designated, area of information, “symbolic of the whole institution of privacy”.³¹ According to Fried, this designated area, whose content may differ considerably from society to society, would include intimate or sensitive information, and exclude the so-called “public” sphere from its scope of protection. Fried’s rationale for the “inevitable fact that privacy is gravely compromised in any concrete social system” is because of “the inevitably and utterly just exercise of rights by others . . .”.³²

For similar reasons, Larry Hunter grants that “although we consider it a violation of privacy to look in somebody’s window and notice what they are doing, we have no problem with the reverse: someone sitting in his living room looking *out* his window.”³³ Consequently, placing any restraint on such activity would constitute an unacceptable restraint on liberty – again a manifestation of the “knock down” normative argument.

In the practical arena, as well as in the theoretical realm, public surveillance is indignantly defended on grounds that it is unreasonable to prevent others from perceiving, noticing, and talking about the goings-on in public realms. This form of argument is favored for protecting the commercial interest in data collection. In the case of Lotus Marketplace Households, executives defending the proposed product, cited considerations like these. Denying legal or moral wrongdoing they argued that only information from the public domain would be used, no private realms would be breached, and no information deemed sensitive or intimate would be included.

Versions of the knock-down argument frequently appear in case law. In *California v. Greenwood*,³⁴ for example, which has been cited as a precedent in many subsequent cases involving (of all things) people’s right to privacy in their garbage, the Supreme Court

³⁰ Charles Fried “Privacy,” *The Yale Law Journal* (Volume 77), p. 493.

³¹ Fried, “Privacy,” pp. 488–489.

³² Fried, “Privacy,” p. 487.

³³ Larry Hunter, “Public Image,” p. 295.

³⁴ 486 U.S. 35, 108 S.Ct. 1625, 100 L. Ed. 2d 30 (1988).

ruled that police had not violated the Fourth Amendment when they arranged for Greenwood's trash collector to segregate his trash and turn it over to them for inspection. The court majority offered the following consideration,

Accordingly, having deposited their garbage "in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it," respondents could have no reasonable expectation of privacy in the inculpatory items that they discarded.³⁵

In another case, *United States v. Scott*,³⁶ the court defended the actions of IRS agents, who had reassembled documents which the defendant had shredded into 5/32-inch strips before disposing of them in the garbage, arguing,

In our view, shredding garbage and placing it in the public domain subjects it to the same risks regarding privacy, as engaging in a private conversation in public where it is subject to the possibility that it may be overheard by other persons. Both are failed attempts at maintaining privacy whose failure can only be attributed to the conscious acceptance by the actor of obvious risk factors. In the case of the conversation, the risk is that conversation in a public area may be overheard by a third person. In the disposal of trash, the risk is that it may be rummaged through and deciphered once it leaves the control of the trasher. In both situations the expectation of privacy has been practically eliminated by the citizen's own action. Law enforcement officials are entitled to apply human ingenuity and scientific advances to collect freely available evidence from the public domain.³⁷

In *Florida v. Riley*,³⁸ this time not involving garbage, the Supreme Court decided that police had not conducted an illegal search when an officer observed from a helicopter, at a height of 400 feet, what he thought were marijuana plants. In a separate but concurring opinion, Justice O'Connor wrote, "I agree that police observation of the greenhouse in Riley's curtilage from a helicopter passing at an altitude of 400 feet did not violate an expectation of

³⁵ This case and a series of related cases are discussed in LaFave, W.R. *Search and Seizure: A Treatise on the Fourth Amendment*, Third Edition, Volume 1 (St. Paul, Minn.: West Publishing Co., 1996).

³⁶ 975 F.2d 927 (1st Circ. 1992).

³⁷ Quoted from LaFave, *Search and Seizure*, p. 603.

³⁸ 488 U.S. 445; 109 S. Ct. 693; 1989 U.S. LEXIS 580; 102 L. Ed. 2d 835; 57 U.S.L.W. 4126.

privacy” that society is prepared to recognize as ‘reasonable.’³⁹”⁴⁰ She argued that in the same way it is unreasonable to expect police to shield their eyes so as to avoid seeing into private property from public thoroughfares, so is it unreasonable for citizens to expect to be free of aerial observation at altitudes where the “public travel with sufficient regularity.”⁴¹

In sum, I have tried to show that attempts to define and defend privacy in public, both in theory and in practice, have been undermined by versions of an argument from competing interests that I call the normative knock-down argument. It is so named because it has had a compelling hold over philosophers, policy-makers, and judges, as well as the commercial interests that benefit from its use.

Empirical

In this section, I outline a third explanation why theorists have seemed to overlook the problem of privacy in public. I suggest that the divergence of philosophical theory from popular resentment of surveillance practices is due, in significant measure, to critical changes which philosophical theory has not yet absorbed because, quite simply, prior to key developments in information technology, the problem did not exist in a compelling form. People could count on virtual anonymity even as they traversed the public arena. We see this assumption at work as the fictional detective, Alexander Gold, interrogates a murder suspect,

“You certainly sounded as though you hated him enough to kill him.”

“Not hated, Mr. Gold, despised. If I had killed him, would I have told you how I felt?”

“Maybe. You could be trying reverse psychology.”

“Yes, but Professor Moriarty, you know that I know that you really know that I really know . . .” Kirsch let his voice fade away.

Alexander had to smile. “All right. Let’s talk about something else. Where were you when Talbott was killed.”

“Jogging. In Central Park.”

“Witnesses?”

³⁹ *Katz v. United States*, 389 U.S. 347, 361 (1967).

⁴⁰ *Florida v. Reilly* (O’Connor, J. concurring).

⁴¹ One of the anonymous reviewers for *Law and Philosophy* points out that newly developed method of government surveillance, for example, through walls, makes this issue even more pressing and problematic.

"Hundreds." ...

"So you have an alibi."

"Not exactly. . . ." ⁴²

Seen by hundreds, noticed by none. Most people reasonably make this assumption: either that they are not noticed, or that any single observer can observe and harbor only discrete bits of information.⁴³ As such, not only would the information be sparse and disjointed but it would be limited by what any single human brain could reasonably and efficiently hold. An individual going about his daily activities does not worry about undue surveillance even if he is observed by one person, on April 4 1997, to be wearing chinos, a blue polo shirt and loafers and to be tall and blond. By another, he is observed purchasing three cases of wine from the local liquor store. By a third he is overheard discussing his son's progress with his school teacher. Later that day, by a fourth, is observed participating in a march for gay and lesbian rights. All these activities occur in the public eye; all may be observed, even noted. No single one of these instances of being observed is necessarily threatening or intrusive.

What has changed? Key advances in computer technology have clearly affected our facility with information. These advances include an exponential decline in the cost of computer storage and processing coupled with vast increments in power, the capacity to create large and complex but decentralized databases on networks of minicomputers and PCs, the use of expert systems for processing data, and the cooperative handling of data both within and among institutions.⁴⁴ These developments in information technology and practices have meant that: a) there is virtually no limit to the amount of information that can be recorded, b) there is virtually no limit to the scope of analysis that can be done – bounded only by human ingenuity, and c) the information may be stored virtually forever. These capabilities combined with alert and intelligent observation

⁴² Herbert Resnicow, *The Gold Solution* (New York: St. Martin's Press, 1983), pp. 116–117.

⁴³ I exclude here special cases such as when suspects are surveilled by law enforcement officers, with a special purpose, such as, hoping to catch them in the act of purchasing a shipment of heroin.

⁴⁴ I draw on H.M. Deitels' characterization of the period of 1970s to the present, which he describes as the "Fourth Generation of information technology." This is discussed in Smith, *Managing Privacy*, pp. 180–181.

have contributed to the practices and modes of surveillance familiar to us.⁴⁵

The effects of these advances are felt along various dimensions. In the public arena, not only may the amount of information increase enormously, but information that was once scattered and transient may now be ordered, systematized, and made permanent. We can do things with the information, such as merge and compare real-time observations with past records, compare those with the records of others, and communicate any of this, at lightening speed, across networks. Mr. Kirsch would have his alibi, and we would have a fuller and more systematic picture of the conservatively dressed father protagonist going about his business on April 4. I discuss the implications of these practices in more detail later in the paper.

An arena in which these changes have been acutely felt is that of public records. According to the Freedom of Information Act,⁴⁶ all governmental records, except those covered by a specified set of exceptions, including The Privacy Act of 1974, are freely available for public access. Even though some records of information about people are covered by The Privacy Act, there are many classes of records with information about persons, such as birth, death and marriage records, drivers records, real estate ownership records, court records, and more, that are public. Prior to computerization and advanced networking capabilities, access to these public records was costly in time and effort. Anyone seeking information from these records would be required to travel to wherever the records were housed, such as Courts and Departments of Motor Vehicles, and painstakingly search for and copy the information they needed. Such effort created de facto protection, serving to limit access and, therefore, exposure.

The computerization of public records has made them available with far less effort, either directly from respective government agencies responsible for collecting them, or from intermediaries who have gathered and organized them. As a consequence, these records

⁴⁵ James Rule also credits changes in social organization, now driven by large anonymous institutions, along with people's desire to be treated as individuals. See James Rule, et al., "Preserving Individual Autonomy in an Information-Oriented Society," in Lance Hoffman (ed.), *Computer Privacy in the Next Decade* (New York: Atheneum: 1980), pp. 65-87.

⁴⁶ F.O.I.A. 5 U.S. Code, sec 552, 1966, strengthened in 1974 and 1976.

are public in a far more thoroughgoing sense than ever before. In two cases that have come before the New Jersey Supreme Court, court opinions have acknowledged that the mode by which information is made public (as in computerized versus paper records) may affect the actual degree of publicity of these so-called "public" records.⁴⁷ In a similar vein, those who have advocated for limiting access to Drivers' Records have argued that when the decision to allow public access to these records was made, the implications of such records being public was quite different from what they presently are. In public deliberations, privacy advocates have suggested that we ought to re-evaluate the meaning of a public record, including such key issues as the criteria of access to records and the grounds for classifying a given database as public. Representatives of other sectors including marketers, information brokers, and media organizations sharply disagree with such suggestions.⁴⁸ This important debate is beyond the scope of this paper.

In review: As a third explanation for neglect of the problem of privacy in public, I have suggested that until powerful information technologies were applied to the collection and analysis of information about people, there was no general and systematic threat to privacy in public. Privacy, as such, was well-enough protected by a combination of conscious and intentional efforts (including the promulgation of law and moral norms) abetted by inefficiency. It is not surprising, therefore, that theories were not shaped in response to the issue of privacy in public; the issue did not yet exist.

III. SHOULD WE PROTECT PRIVACY IN PUBLIC?

To this point, my purpose has been to explain why conceptions of privacy developed by predominant philosophical and normative theories have not accounted for encroachments on privacy occurring in so-called "public" realms. For reasons that are conceptual, norma-

⁴⁷ See *Higg-A-Rella, Inc. v. County of Essex*, 141 N.J. 35 (1985) and *Doe V. Poritz*, 142 N.J. 1 (1995), discussed in greater detail in Nissenbaum, "Toward an Approach to Privacy in Public: Challenges of Information Technology," *op. cit.*

⁴⁸ For example, as debated at the Public Hearings of the Information Task Force Information Policy Committee Working Group on Privacy, held on January 26–27, 1994, Washington DC.

tive and empirical in origin, these theories lack mechanisms to deal with conflicts involving privacy in public and have generally not taken up hard questions about surveillance in non-intimate realms to determine when such surveillance is morally acceptable and when not. Implicit in my discussion so far has been an assumption that now bears direct examination, that normative theories of privacy *ought* to be concerned with privacy in public, that contemporary experience with information technology offers compelling reasons to *expect* from theory that it provide a means of understanding the problem of privacy in public as well as a means for adjudicating it.

A *prima facie* case for caring about public surveillance is that it stirs popular indignation, worry and resentment. The 30,000 letters of protest against Lotus Marketplace Households expressed these reactions as do poll results, such as a 1990 poll showing 90% of respondents agreeing that consumers are being asked to provide excessively personal information. (57% found it a major problem, 33% a minor problem.)⁴⁹ Individual concerns are registered in various ways as shown in the segment below quoted from the RISKS Forum Digest:

Recently . . . several firms have started abusing the power of the Internet to publish large databases of personal information without permission. This is impolite, and in many cases it can even be dangerous.

True story: recently, I followed a lead from MacUser magazine to a web page for dealing with spam e-mailers. That page suggested that one of the first steps to take was to contact services that track people's e-mail addresses. With growing horror, I connected to page after page on the list and located myself in their databases. Some services listed far more than just name and e-mail address. My home address and phone number were accessible from the same record. Two services even had a facility to show a map of my neighborhood and the location of my house in it.

The widespread dispersal of information of this sort, without prior consent, is a serious invasion of privacy.⁵⁰

While invectives like this may signal a morally relevant need, they may also be read as expressions of mere preference, or desire,

⁴⁹ Smith, *Managing Privacy*, p. 125.

⁵⁰ Jon Handler, submitted to RISKS Forum Digest, DEC 23, 1996. RISKS is a moderated bulletin board whose purpose is to publicize and resolve computer-related risks. It is held in high regard within the community of security experts and software engineers.

or even worse, as muddle-headedness. Two noted contributors to the literature on privacy, William Parent and Tom Gerety, would explain it as the latter. Both Parent and Gerety assume the burden of sharpening and clarifying the concept of privacy. Gerety worries that the problem for the concept of privacy;

comes not from the concept's meagerness but from its amplitude, for it has a protean capacity to be all things to all lawyers. . . . A legal concept will do us little good if it expands like a gas to fill up the available space.⁵¹

While he characterizes privacy as an "island of personal autonomy,"⁵² he limits the scope of this autonomy to the "intimacies of personal identity."⁵³ Parent defines a right to privacy that covers only information that is both personal in nature and not anywhere documented in a public place, for example, reported in a newspaper. About all other information, he concludes that it "cannot without glaring paradox be called private."⁵⁴ Thus, for Parent and Gerety, popular judgment aside, public surveillance would not to be a matter that is covered by a right to privacy.

I suggest, contrary to approaches like Gerety's and Parent's, that although an important purpose of philosophical theory is to introduce greater conceptual rigor, a normative theory that strays too far from ordinary usage and popular sentiment is thereby rendered unhelpful, or worse, irrelevant. Yet there is still work to be done, for even if we reject the narrow definitional accounts of theorists like Parent and Gerety, we are not thereby committed to embracing widespread indignation as, in itself, sufficient reason for admitting that moral violation has occurred in the activities of public surveillance and data harvesting. We may regard public expression as a sign, as strongly suggestive, of something more than preference and mere opinion – more so if it is consistent and fairly widespread – and we must seek a greater understanding of its source. Only then

⁵¹ Tom Gerety, "Redefining Privacy," *Harvard Civil Rights-Civil Liberties Law Review*, 12 (2) (1977), p. 234.

⁵² Gerety, "Redefining Privacy," p. 271.

⁵³ Gerety, "Redefining Privacy," p. 281.

⁵⁴ William Parent, "Privacy, Morality, and the Law," *Philosophy & Public Affairs* 12 (5) (1983), p. 271. See also DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology*, especially Chapter 2, for a careful critique of Parent's position.

will we be adequately guided toward a conclusion about whether privacy in public is a legitimate part of the moral right to privacy, and if so, under what conditions. To suggest a moral basis for expressions of popular indignation we must show that popular reaction plumbs human needs that are deeper and more universal than “mere” preferences and desires.

It is with this purpose that I explore two key aspects of public data harvesting. One is the practice of shifting information from one context to another – usually from the context in which it was collected, to another context.⁵⁵ A second is the set of practices involving collection, collation, and combination of information drawn from diverse sources in activities, known variously as “data mining”, “profiling”, “matching”, and the like. Although the problematic nature of the second set of practices overlaps with first – because it involves the shifting of information from one context to another – it involves an additional concern, which I later elaborate. I will argue that these two aspects of public surveillance make privacy in public an issue which adequate theories of privacy must cover, alongside the issues that have traditionally been acknowledged as part of their territory.

IV. PRIVACY AND CONTEXTUAL INTEGRITY

Most people have a robust sense of the information about them that is relevant, appropriate, or proper to particular circumstances, situations, or relationships. When information is judged appropriate for a particular situation it usually is readily shared; when appropriate information is recorded and applied appropriately to a particular circumstance it draws no objection. People do not object to providing to doctors, for example, the details of their physical condition, discussing their children’s problems with their children’s teachers, divulging financial information to loan officers at banks, sharing with close friends the details of their romantic relationships. For the myriad transactions, situations and relationships in which people engage, there are norms – explicit and implicit – governing how much information and what type of information is fitting for

⁵⁵ A term that has entered the vocabulary of on-line discussions, for this, is “data creeping.”

them. Where these norms are respected I will say that contextual integrity⁵⁶ is maintained; where violated, I will say that contextual integrity has been violated.

Norms governing the appropriateness of information to a context may mark some information as appropriate for it and some information as inappropriate. It may be appropriate to expect an employee, for example, to yield a great deal of information to an employer concerning past employment and education, but inappropriate to have to provide information about, say, marital status or sexual orientation. Citizens routinely provide a great deal of information to government agencies and consider it appropriate to do so, but they are careful about what information they are willing to provide to which agencies. And there is some information, such as religious affiliation, which they are likely to resist giving to any government agency at all. Family members know us well, but prying relatives may rankle us by asking the details of our romantic entanglements. These twinges of indignation are not necessarily reserved for demands for personal, sensitive, or intimate information. They occur even when a store clerk requires one's name and address for a cash transaction, as was standard practice at branches of Radio Shack, or when on-line services ask for information about one's off-line life, as a subscription to the electronic version of *The New York Times* requires of potential subscribers by insisting they complete a questionnaire asking not only for their names and electronic identification, but also for mailing address, gender, age, and household income.

About the norms governing specific relationships and situations, and who determines these norms – whether by mutual agreement, by authority of one of the participants, through the shaping influence of culture and society – a great deal could and should be said. Although I do not here have a ready theory about contexts and the particular norms associated with them, it is critical to the position on privacy in public that I articulate in this paper, that such a theory be considered plausible. Furthermore, at least some of the norms of contextual integrity must be shown to originate from sources other than mere

⁵⁶ A similar idea has been proposed by the philosopher Jeroen van den Hoven. He uses the term, "spheres of access," to cover essentially the same idea as "contextual integrity."

convention, must be seen as protecting something of independent value to individuals, or to society, or to both. For if the norms of contextual integrity express only the conventions of the day, then critics may argue that it is simply a matter of time before people will become accustomed to the new order brought about by information technology and readily accept the new privacy conventions of public surveillance. Just as, according to Justice O'Connor, airplanes have changed the norms of privacy vis-a-vis surveillance from the air, so new norms will emerge regarding the collection and use of information about persons. Objections to all the various forms of public surveillance described in the first section of this paper will cease.⁵⁷

Existing philosophical work on privacy, though it does not address the issue exactly as defined in the previous paragraph, lends credibility to the idea of independent value protected by norms of contextual integrity. James Rachels, for example, argues that a right to privacy ought to include the right not only to control whether information is shared, but when and with whom it is shared. In having the power to share information discriminately, people are able to define the nature and degree of intimacy of various relationships:

The same general point can be made about other sorts of human relationships: businessman to employee, minister to congregant, doctor to patient, husband to wife, parent to child, and so on. In each case, the sort of relationship that people have to one another involves a conception of how it is appropriate for them to behave with each other, and what is more, a conception of the kind and degree of knowledge concerning one another which it is appropriate for them to have.⁵⁸

The capacity to define the nature and degree of closeness of relationships is an important aspect of personal autonomy, Rachels argues, and ought to be protected. Having to enter relationships or settings with little or no control over what is known about one, may lead to a

⁵⁷ I am grateful to Philip Agre for prodding me into seeing that simply asserting the presence of norms is not grounds enough for rejecting a new practice that violates the norms. We need further to show that the norms are more than "mere" convention and that they protect something of genuine value to individuals or society or both. Ferdinand Schoeman, in *Privacy and Social Freedom* (Cambridge: Cambridge University Press, 1992), Chapter 10, introduces a similar concept in his discussion and literary exploration of "spheres of life."

⁵⁸ James Rachels, "Why Privacy is Important," *Philosophy & Public Affairs* 4 (4) (1975), p. 328.

sense of having been demeaned, embarrassment, disempowerment, or even fear.

Schoeman sees similar value in respecting norms of contextual integrity. He writes,

People have, and it is important that they maintain, different relationships with different people. Information appropriate in the context of one relationship may not be appropriate in another.⁵⁹

And elsewhere he illustrates this point,

A person can be active in the gay pride movement in San Francisco, but be private about her sexual preference vis-a-vis her family and coworkers in Sacramento. A professor may be highly visible to other gays at the gay bar but discreet about sexual orientation at the university. Surely the streets and newspapers of San Francisco are public places as are the gay bars in the quiet university town. Does appearing in some public settings as a gay activist mean that the person concerned has waived her rights to civil inattention, to feeling violated if confronted in another setting?⁶⁰

People's judgments that privacy has been violated concur more systematically with breaches of contextual integrity than with breaches of only intimate or sensitive realms. Although they may ascribe special status to the latter, they do not thereby accept that outside of this special realm no norms of privacy apply; they do not accept that outside this special realm information is detachable from its context and is – we might say – “up for grabs.” This attitude is reflected in the indignation that may follow as simple a gesture as a stranger asking a person his or her name in a public square. By contrast, even if information is quite personal or intimate, people generally do not sense their privacy has been violated when the information requested is judged relevant to, or appropriate for, a particular setting or relationship. And this is why traditional theories of privacy, which take as their guideposts the dichotomy of private versus public, asserting that privacy is morally violated only when private information or the private sphere is inappropriately revealed,

⁵⁹ Ferdinand Schoeman, “Privacy and Intimate Information,” in F. Schoeman (ed.), *Philosophical Dimensions of Privacy: An Anthology* (Cambridge: Cambridge University Press, 1984), p. 408.

⁶⁰ F. Schoeman, “Gossip and Privacy” in R.F. Goodman and A.B. Ze’ev (eds.), *Good Gossip* (University Press of Kansas, 1994), p. 73.

diverge from popular judgment which takes contextual integrity as its benchmark. Whereas the former considers privacy norms as relevant only to private or intimate information, the latter considers privacy norms as potentially relevant to any information.

In the public surveillance currently practiced, information is routinely shifted from one sphere to another, as when, for example, information about your supermarket purchases is sold to a list service for magazine subscriptions. At times, the shift may cross not only contextual lines but temporal lines as information collected in the past – sometimes a very long time past – is injected into a current setting. (Unlike human memory, which fades, computer memory lasts indefinitely.)

When the actress Rebecca Shaefer was murdered and police discovered that her murderer had traced her whereabouts through drivers' records, people were not only outraged by the murder but indignant over the means by which her attacker had traced her. As a result, State Departments of Motor, which have become a fertile source of information routinely collected from licensed drivers and owners of registered vehicles, have become an irritant to privacy advocates as well as individuals who are aware of widespread trade in their computerized records. Public indignation stirred by Shaefer's murder, and similar perceived breaches, led to passage of the Drivers' Privacy Protection Act of 1993⁶¹ which places some restrictions on the sale of these records. Critics still argue that these restrictions do not go far enough.⁶²

It is commonplace for information deemed not to be "sensitive" to be freely shifted about, transmitted, exchanged, transferred, and sold. Those who engage in these practices seem to assume that the information in question has been dislodged from its contextual attachments and therefore "up for grabs". Discomfort with

⁶¹ 103rd Congress, H.R. 3365.

⁶² In another driver-related case, privacy advocates worry about E-ZPass, the electronic toll system operating on toll roads and bridges in the East Coast of the United States, operated by the Triborough Bridge and Tunnel Authority. Electronic devices installed in a motor vehicle transmit information about identity for billing purposes. Critics worry that information about drivers' whereabouts may be used in unrelated contexts. Apparently, the New York Police Department successfully fought against a requirement that records be closed to access except via subpoenas.

the practices involving the shifting around of information reflects a far different perspective: it suggests that people judge norms of contextual integrity, and consequently privacy, to have been violated even when the information in question is not sensitive or intimate. People resent the rampant and unauthorized distribution of information about themselves not only when they violate the integrity of an intimate and personal realm, but when they violate contextual integrity. In violating contextual integrity they strike at an important aspect of why people care about privacy.

V. AGGREGATION

At the heart of contemporary data harvesting is the activity known variously as “profiling”, “matching” “data aggregation” and “data mining” in which disparate records, diverse sources of information about people, are aggregated to produce databases with complex patterns of information. Smith describes a number of cases. For example, A.T.&T. creating specialty directories for customers⁶³ based on the aggregated record of their 800 calls; Citicorp’s analyzing the credit card purchases of customers in order to sell profiles to others;⁶⁴ banks that Smith studied creating an expert system to categorize individuals into profile groups by pooling information about them that the banks held; super-bureaus collecting “information available in many places – from regular credit bureaus (both major and independent), drivers’ license and motor vehicle records, voter registration lists, Social Security number lists, birth records, court records, etc.”⁶⁵ in order to devise comprehensive profiles about individuals that would indicate such things as: purchasing power (credit card activity index, estimated income, fixed payments, etc.), purchasing activity (active accounts, bank debits, etc.), shopping data, and demographic data (job, marriage status, dwelling type, gender, market segment, etc.).⁶⁶

Data aggregation is by no means limited to the private sector. Used for some time by law enforcement and the Drug Enforce-

⁶³ Smith, *Managing Privacy*, p. 185.

⁶⁴ Smith, *Managing Privacy*, p. 186.

⁶⁵ Smith, *Managing Privacy*, p. 124.

⁶⁶ Smith, *Managing Privacy*, pp. 114–115.

ment Agency, the enterprising San Diego County government has engaged in the practice for commercial purposes. It created and sold a CD-ROM disk containing the records – including name, address, telephone number, occupation, birthplace, birthdate, and political affiliation – of 1.25 million of its voters.⁶⁷

Data subjects and the harvesters of information alike are keenly aware of the qualitative shift that can occur when individual bits of data are compiled into profiles. From the perspective of the data gatherers, this capability is one of the most exciting advances that information technology enables. Institutions in both the public and private sectors, including law enforcement, financial, and marketing, either take advantage of compiled data directly, or buy these products from others – like credit bureaus and list brokers – who specialize in gathering data from primary sources and organizing it into useful and potentially profitable forms. Information belies the adage about sewing silk purses out of sows ears, for out of worthless bits information we may sew assemblages that are rich in value. Assemblages are valuable for the very reasons that their subjects resent them.

When challenged, supporters and beneficiaries of profiling frequently resort to what I earlier called the normative “knock down” argument. They argue that there are no good reasons to prohibit these activities when the information in question is “out there” and people have made no effort to hide it from view. To prohibit the collection and aggregation of this information would violate the freedom of those who would observe, record, and aggregate it. Because the “cat is out of the bag” already, there is no good reason to stifle the ingenuity of entrepreneurs who would sell and thereby profit from this information. If these entrepreneurs choose to share what they have learned with others, it would violate their freedom of expression to stop them.⁶⁸ Accordingly, any sentiment expressed against profiling should be treated as such, namely as a sentiment, not as an overriding moral consideration.

If defenders of aggregation are correct that no private zones are violated, that the information they use has been provided freely and not under duress, that it is neither stolen nor leaked, then what

⁶⁷ Smith, *Managing Privacy*, p. 190.

⁶⁸ This sort of rhetoric was present during the Lotus Marketplace incident.

could be the privacy interest that is thwarted by the practice of aggregation?

Even if we grant these defenders of data aggregation their premises, their conceptions of aggregation – whether sincere or disingenuous – seem to miss something important about it. It misses whatever element distinguishes the activity of a person casually looking out his or her window observing the passing scene and the activities described below in a continuation of the paragraph quoted earlier from Hunter's paper:

Consider what happens if I write down everything I see out my window, and all my neighbors do, too. Suppose we shared notes and compiled the data we got just by looking out our own windows. When we sorted it all out, we would have detailed personal profiles of everyone we saw. If every move anyone made in public were recorded, correlated, and analyzed, the veil of anonymity protecting us from constant scrutiny would be torn away. Even if that record were never used, its very existence would certainly change the way we act in public.⁶⁹

The difference between casually observing the passing scene out of one's window, which seems perfectly harmless, and the surveillance Hunter has imagined, which seems definitely sinister, is not merely one of degree. In the passage below, James Boyle in his book, *Shamans, Software, and Spleens*, draws attention to a similar concern,

Why do supermarkets offer their preferred customers discounts just for running an electronic card through a scanner on their way past the checkout? Because technology now permits the store to keep a precise record of those customers' purchases and to correlate it with demographic information about them. Advertisers will soon know everything from our individual brand-name preferences for toilet paper to the odds that a middle-class family on a particular street will buy Fig Newtons on a Wednesday. If you are what you eat, then manufacturers will soon have the information technology to know exactly what you are. This commercially driven intrusion has not reached Orwellian proportions – at least, not yet. Nevertheless, information technology has the capacity, if not to *end* privacy, then to redefine what we mean by the term.⁷⁰

While the magnitude, detail, thoroughness and scope are important characteristics of the surveillance described in the two passages,

⁶⁹ Hunter, L. "Public Image," p. 295.

⁷⁰ James Boyle, *Shamans, Software, and Spleens* (Cambridge: Harvard University Press, 1996), pp. 3–4.

they alone do not account for a sense that a moral line has been crossed. There are two further considerations that bear mentioning. First, that the process of compiling and aggregating information almost always involves shifting information taken from an appropriate context and inserting it into one perceived not to be so. That is, the violation of contextual integrity is part of the reason critics find data aggregation to be morally offensive. A second consideration, striking closer to the core of the practice of profiling, is that while isolated bits of information (as generated, for example, by merely walking around in public spaces and not taking active steps to avoid notice) are not especially revealing, assemblages are capable of exposing people quite profoundly.

The value of aggregates is that they are multidimensional and as such provide more information than pictures that are less filled out. Beyond this, however, an aggregate can incorporate a richer portrait of the individual than even the bits taken together (i.e. the whole being more than the sum of parts) as it may include not only information explicitly given but information inferred from that which has been given. As Jeffrey Reiman observes,

...by accumulating a lot of disparate pieces of public information, you can construct a fairly detailed picture of a person's private life. You can find out who her friends are, what she does for fun or profit, and from such facts others can be inferred, whether she is punctual, whether she is faithful, and so on.⁷¹

If we know, for example, that someone has purchased a home pregnancy test, we can infer with some degree of certainty the nature of activities in which she has recently engaged; if a person has registered as a Republican we can infer with some degree of certainty how he or she would react to a range of social and political issues; if someone owns a house in affluent Palo Alto, we can infer his or her minimum financial holdings. In other words, portraits may provide descriptive access to an individual, multiple forms of identification, and a sense of what they care about.

The picture of a person that a profile provides can, for the reasons given, be broad, deep and traverse time. These pictures may be rich enough to reveal aspects of an individual's character,

⁷¹ Jeffrey H. Reiman, "Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future," *Santa Clara Computer and High Technology Law Journal* 11 (1) (1995).

to ground predictions about their propensities, and even suggest ways of manipulating them. One provider of such a service boasts as follows:

With a 98% compliance rate, our registered users provide us with specific information about themselves, such as their age, income, gender and zip code. And because each and every one of our users have verifiable e-mail addresses, we know their data is accurate – far more accurate than any cookie-based counting.

Plus, all of our user information is warehoused in a sophisticated database, so the information is stable, accessible and flexible.

Depending on your needs, we can customize user groups and adjust messages to specific segments, using third-party data or additional user-supplied information. So you can expand your targeting possibilities.

What's more, because they're New York Times on the Web subscribers, our users are affluent, influential and highly engaged in our site.⁷²

Demographic profiles, financial profiles, and consumer profiles identify people as suitable targets for proposed "treatments." Used in this way, a profile may be seen as a device that offers a way of targeting people as the likely means to fulfilling someone else's end.

In sum, the two preceding sections argue that the negative reactions to public surveillance are due at least in part to characteristics of public surveillance that are genuinely morally objectionable. One is that public surveillance practices regularly violate norms of contextual integrity when information readily revealed in one context, and public with respect to it, is transmitted to, and revealed in, another. The importance of integrity of contexts, which has been recognized in relation to intimate and sensitive realms, has not been sufficiently acknowledged in other realms. Also morally objectionable are the activities integral to public surveillance practices known as profiling, data aggregation, and data mining, which provide the means to reach, target, and possibly manipulate their subjects.

VI. PRIVACY IN PUBLIC: A GENUINE PRIVACY INTEREST

I began this paper by suggesting that philosophical theories of privacy, in responding primarily to the threat of governmental intrusion into privacy and to the threat of any intrusions into the

⁷² Advertisement, *The New York Times*, Monday July 14, 1997.

personal, intimate realms, fail to respond to an important and growing challenge to privacy. My purpose has been to argue that public surveillance, which many theorists have denied a central place, ought often to be construed as a violation of genuine privacy interests. Although I have criticized predominant theories of privacy for neglecting this important privacy interest, I rely on the considerable insights developed in these theories to show why even in the public sphere individuals have legitimate privacy interests. It also remains for the courts as well as further theoretical work to develop criteria for distinguishing between those acts of public surveillance that seem not to violate privacy and those that do.

Among the essential contributions that these theories make is drawing the connection between privacy and other values. For many, privacy is valuable, is worth protecting as either a moral or legal right, or both, because it functions to protect and promote other important ends.⁷³ Alan Westin, for example, in his influential book *Privacy and Freedom*, asserts that privacy promotes important human ends in a democratic, free society: it enhances personal autonomy (which he understands as “the desire to avoid being manipulated or dominated wholly by others”⁷⁴), it creates a protected realm for emotional release, provides a context in which an individual can “exert his individuality on events”,⁷⁵ and the creates the possibility of limited and protected communication. Ruth Gavison offers another persuasive account of the essential role privacy plays in safeguarding or promoting other deeply held values including liberty of action, “mental health, autonomy, growth, creativity, and the capacity to form and create meaningful human relations”.⁷⁶ Several other exemplary works on privacy offer analogous insights, demonstrating the value of privacy both for individuals and society. Although I articulate my analysis in terminology drawn primarily from Westin and Gavison, it is not necessarily tied to the details of their theories.

⁷³ This claim is not incompatible with the stronger claims that some make about privacy, that it is valuable not only because it is instrumental in achieving other ends but as an end in itself.

⁷⁴ Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1967), p. 33.

⁷⁵ *Ibid.*, p. 36.

⁷⁶ Ruth Gavison, “Privacy and the Limits of the Law,” p. 442.

These approaches have in common a version of the idea that privacy protects a “safe haven”, or sanctuary, where people may be free from the scrutiny and possibly the disapprobation of others. Within these private spheres people are able to control the terms under which they live their lives.⁷⁷ By exercising control over intimate and sensitive information about themselves, people may exercise control over the way they portray themselves to others, especially those others with whom they engage in lasting relationships. These two forms of privacy, namely, control over information and control over access, are among the conditions for a free society and, among other things, enhance people’s capacity to function as autonomous, creative, free agents.

In the world before powerful computers, virtually limitless storage capacity, software for information management, and network capabilities, privacy was well enough protected by safeguarding sensitive information and intimate spheres against unwanted intrusion. Through a relatively narrow range of prohibitions, privacy was afforded a decent level of protection because, as discussed in the section on empirical reasons for the neglect of privacy in public, the prohibitions themselves were abetted by conditions such as the limits of human memory, polite indifference, and inconvenience.

But these conditions no longer hold. In their place we have powerful information technology coupled with an insatiable desire to know – whatever now may be useful to someone, somewhere, or what may become so in the future. Information is fluid and comprehensive; cleverly devised profiles constitute a powerful tool for understanding people, influencing their behavior, and even manipulating them. Those who are not fully aware what or how much others know about them are more easily targeted or manipulated. Those with greater awareness and understanding may be able to protect their privacy more effectively, but at the expense of developing a wariness, self-consciousness, suspicion, and even tentativeness in their relations with others. DeCew describes this as “a chilling

⁷⁷ John Kleinig reminds me that even these freedoms are limited. One cannot, for example, claim protection for spousal abuse on grounds that it occurs in private.

effect” on behavior.⁷⁸ The values that were once relatively well shielded through the fortification of the intimate realm are now vulnerable via other, supposedly public, approaches. Because there is more at stake in an individual’s controlling even non-intimate information, it is no longer self-evident that the balance must favor the freedom of those who seek to observe and record when weighed against the privacy interests of those who are observed.

These considerations support the view that popular reaction to public surveillance is not merely a reflection of popular – possibly irrational – sentiment but a recognition that prominent elements of public surveillance constitute a genuine moral violation of privacy. Reasons for protecting privacy in public are quite similar to reasons for protecting privacy of the more traditional kind because values placed in jeopardy from invasions of the intimate realm are also jeopardized by various forms of public surveillance practiced today. As noted earlier, these values are wide-ranging, including individual values such as autonomy, liberty, individuality, capacity to form and maintain intimate relations, mental health, creativity, personal growth; as well as social values such as a free and democratic society. Those who engage in contemporary practices of public surveillance have discovered a novel way to eavesdrop, to spy on, to learn more about people than they have a legitimate right to know. And preventing this constellation of intrusions is one of the fundamental protections that privacy offers.

VII. IMPLICATIONS FOR POLICY

The purpose of this paper has been to present a case for extending or revising existing philosophical theory, or developing new theories, that would accommodate privacy in public. I hope to have succeeded in this. Although the purpose has not been to recommend or craft specific privacy policies, I would like, in these concluding paragraphs, to consider whether a recognized interest in privacy in public could have any power to shift the course of privacy policy in the United States, which at present, gives no systematic consideration to it.

⁷⁸ Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics, and the Rise of Technology* (Ithaca: Cornell University Press, 1997) p. 64.

I see two means. One would be to emphasize the principle of contextual integrity in order to weaken the influence of the private-public dichotomy in setting the agenda for privacy, policy as well as theory. The idea of contextual integrity and the norms emerging from it ought not be utterly foreign. There is, after all, ample precedent in relationships that explicitly call for confidentiality such as physician to patient, clergyman to congregant, and so on. We can view these relationships and contexts that call for confidentiality as instances of a more general requirement of contextual integrity. We may likewise view the Video Privacy Protection Act as giving legal protection to the video rental context, also an extension of the familiar professional settings. Building upon such cases, we might extend application of a principle of contextual integrity further to cover various settings such as medical insurance bureaus, charitable organizations to which one has donated, some as mundane as supermarkets, and more.⁷⁹

Some privacy advocates object to the approach just described – a “sectoral” approach – favoring a second, “omnibus” approach. This second approach accords a strong, comprehensive right to privacy which grants control to individuals over all information about themselves irrespective of context. The European Union’s privacy initiative, scheduled to take effect in 1998, is considered an example of this approach.⁸⁰ Recognizing a fundamental right to privacy shifts the burden away from individuals having to demonstrate the importance of maintaining control over various especially sensitive categories of information onto potential gatherers and users of information, who would need to demonstrate a critical need for the information. Although it is important to show that there are feasible policy mechanisms for protecting privacy in public, I will not pursue the details of these options here.

Before concluding, I will consider a possible objection to the protection of privacy in public, namely the objection I earlier called, the normative “knock-down” argument. Are we in a position to

⁷⁹ This takes us into the territory of hard-fought battles over whether integrity would be more aptly protected through opt-in versus opt-out. Opt-in, in my view, is far truer to privacy requirements but I will not take up the matter here.

⁸⁰ This is the approach that is incorporated in the European Union Privacy Directive which is scheduled to take effect in 1998.

better understand this argument, and more important, will we be able to defend privacy in public against it?

As we have seen, those who invoke a normative knock-down argument against protecting privacy in public usually point out that the information in question is neither intimate nor sensitive. They also say that because the information in question has been freely exposed in public by its subjects, it is unreasonable and wrong for their subjects to claim a right to prevent access to it or use of it.

In responding to such an argument I would suggest, first, that some of its power is based on an equivocation on the “it” to which subjects have supposedly given implicit consent. While shoppers in a supermarket have implicitly consented to fellow shoppers seeing the contents of their shopping carts – they do not expect fellow shoppers *not* to look – they have neither implicitly nor explicitly agreed to others collecting the information and selling it to third, fourth, etc. parties so that the data may be warehoused, mined, and assembled, so that their behavior may be modeled and manipulated. Just as someone buying a pregnancy test in a drugstore may have no choice but to expose this bit of information to fellow shoppers, they have not thereby acceded to unrelenting publication of their sexual behavior.

A detractor may still balk. To incorporate protection for privacy in public into law and public policy is, nevertheless both unrealistic and unreasonable. Even if the moral authority of the normative “knock-down” argument has been undermined, its practical force remains evident in Reiman’s warning. The challenge remains that if one is willing to be open, and behave openly, it would be an oppressive society that enforced norms of privacy that entailed a right never to be seen on a crowded street. The burden placed on others cannot interfere with the normal activities of their daily lives, we cannot expect in general, as Justice O’Connor wrote about police officers in particular, that people “shield their eyes when passing by.”⁸¹

Although it seems both impossible and wrong to impose so great a burden on people in order to protect privacy in public, it is not impossible to articulate other measures of protection that are not overly burdensome and at the same time do not unduly compromise

⁸¹ 488 U.S. 445; 109 S. Ct. 693; 1989 U.S. LEXIS 580; 102 L. Ed. 2d 835; 57 U.S.L.W. 4126 (O’Connor, J., concurring).

what is valuable in privacy in public. This would involve recognizing the distinction between exposing something for observation, on the one hand, and yielding control over it, on the other. Although at first this may seem practically difficult or even impossible, a model for policy based in recognizing such a distinction may be found in another area of discourse – intellectual property. Two central mechanisms for protecting intellectual property, patent and copyright, are devised expressly for the purpose of allowing something to be exposed (in this case, the works of intellectual labor) without yielding control over it. While I do not support the position, sometimes put forward, of privacy as a form of self-ownership⁸² (a debate for another occasion), I suggest that for purposes of crafting reasonable policy, the practical mechanisms developed in the service of intellectual ownership, which are socially entrenched and for the most part successful, may serve well for the purpose of protecting privacy.

This paper has argued for a right to privacy that would encompass privacy in public. Although it does not articulate a theory from which this extended right can be derived, it has advanced principles to guide the development of such a theory, principles according to which activities that, in the past, have fallen outside the scope of many influential legal and philosophical theories, may be judged relevant to a moral right to privacy. I have in mind here, the principle of contextual integrity and the principle that no information is genuinely “up for grabs”, available for purposes such as aggregation, profiling, and data mining. These principles offer criteria for discriminating from among the various forms of public surveillance and record-keeping those that constitute moral violations of privacy and those that do not.

5 Ivy Lane

University Center for Human Values

Princeton University

Princeton, NJ 08544

U.S.A.

⁸² See for example Laudon, K. “Markets and Privacy,” *Communications of the ACM* 39 (9) (1996).

HEINONLINE

Citation: 2001 Sup. Ct. Rev. 139 2001

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Mon May 2 16:00:40 2011

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0081-9557](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0081-9557)

PRIVACY AND SPEECH

We often disclose ourselves to the world at large, or at least we act as if indifferent to the world's eyes. But at other times, most of us try to control the disclosure of certain matters about ourselves. Sometimes we share thoughts, feelings, information, personality, or bodily appearance with no one at all. More commonly, we share these things with a limited number of other people. Privacy in this sense—the ability to control and to avoid the disclosure of certain matters about oneself—is a widely recognized value, an important precondition for human flourishing.

Freedom of speech and freedom of the press are also deeply cherished values. The right to generally say and publish what one wants is a bedrock element of human freedom and democratic self-governance, and this encompasses saying and publishing things about other people, including things they would prefer not be said or published about them. The tension between free speech and privacy is not so much a conflict among camps of adherents as it is a tension within ourselves. Both privacy and speech are values of great importance, and people typically embrace both of them. Louis Brandeis, the co-author of the most famous article on privacy ever written,¹ was also the author of some of the greatest prose ever written about free speech.²

Although the tension between speech and privacy is hardly a

Paul Gewirtz is Potter Stewart Professor of Constitutional Law, Yale Law School.

AUTHOR'S NOTE: I am grateful to Zoë Baird, Jack Balkin, Philip Chen, Jacob Katz Cogan, Owen Fiss, Linda Greenhouse, and Spiros Simitis for their very helpful comments on an earlier draft, and to Daniel Marx for his excellent research assistance.

¹ Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv L Rev 193 (1890).

² *Whitney v California*, 274 US 357, 372 (1927) (Brandeis concurring).

new one, it has expanding significance. New technologies have opened up wonderful new possibilities for communication and expression, but also have created ominous new possibilities for diminution of privacy. Any breach in privacy, of course, can be greatly magnified if the media discloses it to the public—and the public's appetite for information about other people's private matters, and the media's willingness to satisfy that appetite, have never been greater. These and other developments have underscored the vulnerability of privacy and have created new concerns about the balance between free speech and privacy.

The Supreme Court has considered this tension in a number of cases over the past decades, and there is a clear pattern. Speech almost always wins. In rejecting privacy claims, the Court's broadly stated First Amendment rationales leave little room for privacy protection in cases of a speech-privacy conflict. In this article, I argue that the Supreme Court should give more weight to privacy protection than it has. My goal is to define a constitutional position that gives strong weight to speech, recognizing its central and indispensable role, but that also gives sufficient weight to privacy, recognizing its crucial role as well.

My starting point is last term's decision in *Bartnicki v Vopper*.³ *Bartnicki* continues the Court's basic pattern of ruling for the media in cases of speech-privacy conflict. In *Bartnicki*, the Court held, by a vote of 6–3, that the media has a First Amendment right to broadcast certain information that had been illegally intercepted from a cell phone conversation. The “opinion of the Court” written by Justice Stevens makes some bows in the direction of protecting privacy, but ends up giving privacy little weight.

But the case may well represent a turn on the Court toward greater protection of privacy and greater restrictions on the media and speech. It is misleading to think of Justice Stevens's opinion as a true “opinion of the Court.” Justice Breyer, joined by Justice O'Connor, wrote an important and unusually interesting concurring opinion analyzing the speech-privacy conflict in a way far more protective of privacy than Justice Stevens's opinion. Although Justices Breyer and O'Connor joined the Stevens opinion, their votes were needed to make up the six-member majority.

³ 121 S Ct 1753 (2001).

When read alongside the opinion of the three dissenters, who thought the media should lose this case, the Breyer opinion makes clear that a majority of the Court is prepared to uphold significant restrictions on the media in order to protect privacy.

The time is now ripe to establish a new framework for considering speech-privacy cases that gives enhanced protection to privacy. Justice Breyer's opinion is a start in that direction, as well as a significant installment in his little observed but important ongoing effort to develop a new approach to the First Amendment generally. As Justice Breyer's opinion suggests, it will be difficult to enhance privacy protection without, to some extent, modifying First Amendment doctrine as it currently exists. The challenge is to find greater room for protecting privacy within our constitutional law without undermining the media's freedom to perform its crucial roles. In this article, I seek to advance that effort.

I

At issue in *Bartnicki* was the constitutionality of a provision in Title III of the Omnibus Crime Control and Safe Streets Act that sought to prevent invasions of privacy that occur through the interception and disclosure of wire, oral, or electronic communications. The statute provides sanctions against "any person who . . . intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of" such a communication.⁴

The case involved the unlawful interception of a cell phone conversation between two union officials during a period of collective bargaining negotiations involving the teachers' union and a local Pennsylvania school board. The conversation concerned various matters related to the status and handling of the negotiations and a possible strike. At one point, one union official said to the other, "If they're not gonna move for three percent, we're gonna have to go to their, their homes . . . To blow off their front porches, we'll have to do some work on some of those guys."⁵ The telephone call was covertly and unlawfully intercepted and taped by

⁴ 18 USC § 2511(1)(c).

⁵ 121 S Ct at 1757.

an unidentified person who gave the tape to a prominent union opponent, who then gave it to a radio station broadcaster. The broadcaster played the tape on his talk show. The union officials whose conversation had been intercepted filed suit for damages under Title III. The case reached the Supreme Court after a divided U.S. Court of Appeals for the Third Circuit ordered entry of summary judgment for the broadcaster.⁶

Justice Stevens's opinion for the Court affirmed, declaring the Act unconstitutional as applied because it restricted media freedom to publish the illegally intercepted material. Two factors were critical for Justice Stevens. First, the media was not itself involved in the illegal interception of the conversation. Second, the information disclosed involved a matter of "public concern"; the intercepted conversation was between two union officials discussing negotiations over the proper level of compensation for teachers in the union.

Justice Stevens starts his opinion by stating that "these cases present a conflict between interests of the highest order—on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech."⁷ But there is very little in what follows that treats these interests as if they were of equivalent importance and both of the "highest order."

Justice Stevens's legal analysis begins with notable elusiveness in discussing the governing legal standard. Both the majority and dissent in the Court of Appeals had concluded that an "intermediate scrutiny" test should be used, not "strict scrutiny," because Title III is a "content neutral" law.⁸ The Solicitor General, urging reversal, agreed that "intermediate scrutiny" was appropriate.⁹ These conclusions were not surprising in light of prevailing First-

⁶ 200 F3d 109 (3d Cir 2000).

⁷ 121 S Ct at 1756.

⁸ 200 F3d 109, 121, 131 (3d Cir 1999). The other two Courts of Appeals that had considered the issue before the case came to the Supreme Court also applied intermediate scrutiny. *Boebner v McDermott*, 191 F3d 463, 467 (DC Cir 1999), vacated and remanded, 121 S Ct 2190 (2001); *Peavy v WFAA-TV*, 221 F3d 158 (5th Cir 2000), cert denied, 121 S Ct 2191 (2001). Both courts found Title III constitutional as applied to the facts of those cases.

⁹ Reply Brief for the United States at 11–13, 16–33, *Bartnicki v Vopper*, 121 S Ct 1753 (2001) (Nos 99-1687, 99-1728) (available at 1999 US LEXIS Briefs 1687).

Amendment doctrine. "Strict scrutiny," the Supreme Court has said, is applied "to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content," but content-neutral laws of general applicability are subject to "an intermediate level of scrutiny" because they "pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue."¹⁰

Title III is a content-neutral law of general applicability. It protects all private communications from unlawful intrusions and prohibits the use and disclosure of all illegally intercepted communications, without regard to the content of what is intercepted. The prohibition on disclosure is triggered by the source of the communication—an illegal interception—not the substance of an interception. Indeed, exactly the same content can be published if its source is not an unlawful interception.¹¹ Moreover, Title III applies generally to all "uses" of the unlawfully intercepted communication—speech uses and non-speech uses (say, using the information in buying securities or developing a product), and expressive uses by all media. Title III's purpose is not to suppress disfavored ideas, but to protect the privacy of communications, without regard to the content of what is privately communicated. In doing so, Title III not only protects privacy but also promotes free speech itself by encouraging uninhibited expression and reducing the fear that uninhibited discussions might be intercepted, used, and disseminated. As such, Title III's use and disclosure restrictions meet all the criteria for "intermediate scrutiny."

But Justice Stevens does not apply intermediate scrutiny—indeed he does not mention it, except in his summary of the Court

¹⁰ *Turner Broadcasting System v Federal Communications Commission*, 512 US 622, 641–43, 661 (1994). See also *Cohen v Cowles Media Co.*, 501 US 663, 669 (1991); *San Francisco Arts & Athletics, Inc. v United States Olympic Comm.*, 483 US 522, 536–37 (1987). A content-neutral law of general applicability will be sustained under "intermediate scrutiny," the Court has said, "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Turner Broadcasting System v Federal Communications Commission*, 512 US at 662 (quoting *United States v O'Brien*, 391 US 367, 377 (1968)).

¹¹ Cf. *Seattle Times Co. v Rhinehart*, 467 US 20, 34 (1984) (media defendant may be placed under protective order not to disclose information that had come from the defendant in the discovery process, although it could publish identical information that came from a different source).

of Appeals' opinion below.¹² Indeed, nowhere in the opinion does Justice Stevens say that he is applying either strict scrutiny or intermediate scrutiny. The closest he comes to articulating a governing legal standard is to say that the restriction here must be justified by "a need . . . of the highest order" (quoting *Smith v Daily Mail Publishing Co.*).¹³ The dissent calls this "strict scrutiny,"¹⁴ and perhaps it is—although Justice Breyer, who joins the Stevens opinion, says in his concurrence that "strict scrutiny" is "out of place" in this kind of case.¹⁵

Justice Stevens takes this "need . . . of the highest order" standard from a series of four cases that do not seem applicable: *Florida Star v B.J.F.*,¹⁶ *Smith v Daily Mail Publishing Co.*,¹⁷ *Landmark Communications, Inc. v Virginia*,¹⁸ and *Cox Broadcasting Corp. v Cohn*.¹⁹

¹² Justice Stevens begins his legal analysis of the case (Part V of the opinion) by saying that "we agree with petitioners" that Title III is "a content-neutral law of general applicability," and explaining why:

[T]he basic purpose of the statute at issue is to "protec[t] the privacy of wire[, electronic], and oral communications. . . ." The statute does not distinguish based on the content of the intercepted conversations, nor is it justified by reference to the content of those conversations. Rather, the communications at issue are singled out by virtue of the fact that they were illegally intercepted—by virtue of the source, rather than the subject matter.

121 S Ct at 1760. Characterizing Title III as a "content-neutral law of general applicability" was exactly what led the Court of Appeals below and the Solicitor General before the Supreme Court to argue that the intermediate scrutiny test was appropriate here. Yet instead of taking the seemingly next step of saying that therefore this case is governed by intermediate scrutiny, Justice Stevens simply moves on. "[O]n the other hand," he says, "the naked prohibition against disclosures is fairly characterized as a regulation of pure speech, . . . not a regulation of conduct. . . . [A]s such, it is the kind of 'speech' that the First Amendment protects." *Id* at 1761. Leaving to one side the revealing characterization of the regulation here as a "naked" prohibition (of "pure" speech no less), this "on the other hand" discussion seems beside the point. It is true that intermediate scrutiny, in addition to being used for "content-neutral laws of general applicability," is sometimes also used for laws that regulate "conduct" and have only an incidental effect on "speech." Justice Stevens sensibly appears to be rejecting this alternative basis for using intermediate scrutiny. But rejecting a second possible ground for using intermediate scrutiny is not an "on the other hand" counterargument to the first ground. Having made this "on the other hand" point, though, Justice Stevens simply moves on, drawing no conclusion here at all about the appropriate legal standard to be used. All of Part V of the opinion reads like a false start.

¹³ *Id* at 1761 (citing the *Daily Mail* case at 443 US 97, 102 (1979)).

¹⁴ *Id* at 1770 (Rehnquist dissenting).

¹⁵ *Id* at 1766 (Breyer concurring).

¹⁶ 491 US 524 (1989).

¹⁷ 443 US 97 (1979).

¹⁸ 435 US 829 (1978).

¹⁹ 420 US 469 (1975).

In all of these cases, the Court sided with the media in concluding that the First Amendment prohibited the government from punishing the publication of information claimed to invade people's privacy. Although superficially similar to *Bartnicki*, these cases were very different in fundamental respects relevant to both the choice of legal standard and the outcomes.

Most significantly, these cases all involved the publication of information that was "lawfully obtained." This was the explicit and crucial predicate for the legal standard used. As the Court in *Florida Star* summarized the rule governing these cases (referred to commonly as "the *Daily Mail* principle"), when "a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."²⁰ In each of these cases, the information published by the media was not unlawfully obtained by the media or by anyone else. In *Cox Broadcasting*, a television station broadcast a rape victim's name that had been in "official court records open to public inspection."²¹ In *Landmark Communications*, a newspaper printed information about proceedings pending before a judicial inquiry commission, information that the Supreme Court emphasized had not been "secure[d] . . . by illegal means."²² In *Daily Mail*, a newspaper published the name and photograph of a fourteen-year-old boy arrested for murder after getting the information by "routine newspaper reporting techniques."²³ In *Florida Star*, a newspaper published the name of a victim of a sexual assault after learning the name from a police report placed in the police department's pressroom.²⁴ Some of these cases are critiqued below for giving insufficient weight to privacy interests, but at least the published information in these cases was not illegally secured, as it was in *Bartnicki*.

The fact that published information has been lawfully obtained properly structures First Amendment analysis. More directly relevant here, the fact that information is *unlawfully* obtained properly

²⁰ 491 US at 533 (quoting *Smith v Daily Mail Publishing Co.*).

²¹ 420 US 469, 495 (1975).

²² 435 US at 837.

²³ 443 US at 103.

²⁴ 491 US at 527.

structures First Amendment analysis, and justifies a very different legal standard. This is because, where information has been obtained unlawfully, very different values are predictably involved—most obviously, there are likely to be distinctively strong privacy (or confidentiality) interests as well as an understandable desire to arrange incentives (including the incentives of the media) to reduce the incidence of unlawfulness.²⁵ In *Florida Star*, the Court not only repeated the formulation of the *Daily Mail* standard that is limited to “lawfully obtained” information, but specifically stated that a case would fall “outside the *Daily Mail* principle” if the information were in private hands and obtained “nonconsensual[ly].”²⁶

Because the information broadcast in *Bartnicki* was unlawfully intercepted,²⁷ the case involves a range of concerns outside the *Daily Mail* principle. Justice Stevens makes much of the fact that the initial unlawful obtaining of the information was done by a third party rather than the broadcaster. But it is hard to see why this should make any difference. Title III limits the media only where it knows or has reason to know that the information comes from an illegal interception.²⁸ Surely the knowing exploitation of an illegality is not an innocent state of mind. More fundamentally, the illegal interception is what makes the broadcast a distinctive invasion of privacy, which properly prompts a constitutional analysis different from that in the *Daily Mail* line of cases.

The particular laws challenged in the *Daily Mail* line of cases and the circumstances of their application involved other features that further demonstrate why *Bartnicki* should have triggered a different analysis under current First Amendment doctrine. First, in all four cases, the challenged law was content-specific—and, as

²⁵ Doctrinal rules are rules of thumb that take account of the predictably competing values at stake in applying legal provisions in particular types of circumstances. It would defeat the purpose of doctrinal rules not to use different tests when predictably very different values are involved.

²⁶ 491 US at 534. At another point in the *Florida Star* opinion, the Court adds that “the *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well.” 491 US at 535 n 8.

²⁷ In addition, the information came to the radio station through a series of “disclosures” that were themselves illegal.

²⁸ The statute also limits liability to those disclosures that are “intentional.” 18 USC § 2511(1)(c). Negligent disclosure of the contents of an illegally intercepted conversation is not sanctioned.

noted above, content-specific laws generally trigger strict scrutiny. In *Cox Broadcasting*, *Florida Star*, and *Daily Mail*, the challenged statutes prohibited disclosures of certain specific types of information in criminal cases (the names of rape victims in the first two, and the names of juvenile offenders in the latter). In *Landmark Communications*, the statute prohibited disclosures of the content of judicial commission proceedings only. Indeed, in at least *Landmark Communications*, the state law had the earmarks of the government trying to censor unpleasant information about government officials and limiting criticism of the government (allegations that might harm a “judge’s reputation” or public “confidence in the judicial system”). In *Bartnicki*, by contrast, the law is content-neutral and has none of the earmarks of government censorship of particular information or ideas.

Second, in all of the cases except *Landmark Communications*, the challenged law applied only to disclosures by the media or by some media. Thus, these were arguably not laws of general applicability.²⁹ The limited scope of the laws in these cases raised questions not only about evenhandedness but also about whether the state was effectively furthering its claimed interests. In *Bartnicki*, by contrast, Title III is a law of general applicability, prohibiting all use and disclosure of illegally intercepted communications.

Third, in all four cases, the government itself was the source of the information. As the Court noted in each case, this means that the government (at least in theory) could have taken steps to control the information rather than creating causes of action against media entities that learn of the information.³⁰ In *Bartnicki*, by contrast, the communication involved private parties rather than the government—and private parties who were victims of a deliberate illegal interception, not their own casualness with the information.

In spite of these differences, Justice Stevens applies the *Daily*

²⁹ In *Cox Broadcasting*, the statute prohibited only the disclosure of rape victims’ names by print, broadcast, television, or radio media. In *Daily Mail*, the statute prohibited only newspapers from publishing the names of juvenile offenders. In *Florida Star*, the statute prohibited publishing rape victims’ names only “in any instrument of mass communication.” In *Landmark Communications*, the statute was not focused on particular media, but made it unlawful to “divulge” information about the proceedings.

³⁰ Arguably, the government should be allowed the additional tool of punishing further disclosures following a leak of its information that it failed to prevent. See text accompanying note 127. But the balance of interests in such a case is somewhat different from the balance in a case where information has been intercepted from private parties.

Mail standard in *Bartnicki*. He concludes that Title III does not advance a “need of the highest order” that would justify restrictions on the media’s disclosures. The fact that the information broadcast was unlawfully obtained neither affects his choice of legal standard nor furnishes a justification to satisfy the standard.

The government identified two “interests” related to protecting privacy from illegal interceptions, but neither satisfies the Court. First, the government argued that punishing disclosures helps to “dry up the market” for illegally intercepted private conversations, and thus reduces the incentives to intercept in the first place. It is especially important to punish disclosures, including those by people who lawfully obtained the illegally intercepted material, because the original act of interception is often hard to detect and punish.³¹ Justice Stevens states that “[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it.”³² But in fact the law commonly tries to deter unlawful conduct by restricting those who try to piggyback on the illegality. Most obviously, the exclusionary rule in criminal cases rests precisely on the belief that police misconduct can be deterred by barring prosecutors and others from using the unlawfully seized evidence.³³ Moreover, the law regularly punishes the knowing receipt and sale of stolen property as a way of deterring thefts.³⁴

Justice Stevens argues that it would be “quite remarkable” to “hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.”³⁵ But there is nothing remarkable or novel about restricting speech that is the fruit of unlawful action as a means of deterring the unlawful action. For example, the First Amendment permits a ban on the distribution of erotic material portraying children, even though not legally obscene, as a means of controlling the illegal exploitation of children in the production of the material. As the

³¹ 121 S Ct at 1773–75.

³² *Id* at 1762.

³³ E.g., *Oregon v Elstad*, 470 US 298, 306 (1985); *Elkins v United States*, 364 US 206, 217 (1960). Indeed, Title III itself has an exclusionary rule barring the use of illegally seized communications as evidence, in order to deter illegal interceptions. 18 USC § 2515.

³⁴ 121 S Ct at 1773–74 (Rehnquist dissenting) (citing W. R. LaFare and A. W. Scott, Jr., 2 *Substantive Criminal Law* § 8.10(a) at 422 (1986)).

³⁵ *Id* at 1762.

Court said in *New York v Ferber*, “[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.”³⁶

Illegal conduct that yields stolen information can be every bit as wrongful and offensive as illegal conduct that yields stolen goods, and there is no reason why deterrence of the former should be disfavored any more than deterrence of the latter. The fact that the fruit of an illegality is speech acts does not make it wrong to try to discourage the illegality, does not make distributing the fruits of the illegality praiseworthy, and does not make it improper to try to discourage the illegality by drying up the market for the illegally obtained material. To say otherwise is inescapably to say that we care less about deterring the illegal stealing of information than the illegal stealing of other things, and that is unjustified. Justice Stevens asserts that in most instances the identity of the person illegally intercepting the communication will be learned. Thus, he argues, there are few instances where prohibiting third party disclosures will help deter unlawful interceptions, and therefore no government interest of the “highest order” is involved. But Congress concluded that “[a]ll too often the invasion of privacy itself will go unknown. Only by striking at all aspects of the problem can privacy be adequately protected.”³⁷ Especially since there is such plausibility to Congress’s assumption that illegal acts will be deterred if wrongdoers are prevented from enjoying the fruits of their wrongdoing, the Court should not have substituted its own judgment.

³⁶ 458 US 747, 760 (1982). See also *Osborne v Ohio*, 495 US 103, 109–10 (1990) (it is “surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand”). To be sure, the speech involved in *Ferber* and *Osborne*, although not legally obscene, is widely understood to have very limited value. It might be argued that suppressing speech that is related to public issues in order to deter the illegal conduct of others is a different matter (just as some object to an exclusionary rule that suppresses valuable probative evidence as a means to deter unlawful police searches). There is indeed a difference, which is one reason I would rest more on the government’s second “interest” in limiting the media disclosures—protecting privacy by limiting the harm that the illegal conduct produces. See text accompanying notes 38–40. But *Ferber* and *Osborne* demonstrate that whether the fruit of illegal activity is property or speech, the Supreme Court has concluded that closing off outlets deters the illegal conduct.

³⁷ S Rep No 1097, 90th Cong, 2d Sess 69 (1968) (quoted in 121 S Ct at 1773 (Rehnquist, joined by Scalia and Thomas, dissenting)).

In any event, quite apart from deterring illegal interception, punishing the disclosure of illegally intercepted communications promotes a second and even clearer interest: protecting privacy by limiting the harm that the illegal conduct produces. Preventing media disclosure is more than a means to deter someone else's illegality (the government's first interest); it also directly protects privacy. As the Court has recognized in other contexts, disclosing illegally intercepted communications "compounds the statutorily proscribed invasion of . . . privacy."³⁸ Such disclosures also deepen the chill on private communication. It is as much an invasion of privacy to disclose an illegally intercepted communication as to make the illegal interception in the first place. Indeed, the intrusion on conversational privacy from the disclosure is often the more serious intrusion, for it allows a far wider audience to "overhear" the private communication. If a legislature has a weighty interest in protecting privacy from unwarranted interceptions of private communications, surely it has the same interest in protecting that privacy from disclosures that many times over "compound[] the statutorily proscribed invasion."³⁹

Nor is it at all remarkable, as Justice Stevens suggests, to limit publication where publication is what produces the harm. If someone breaks into my home and steals my diary or personal letters, of course that person can be sanctioned for publishing the diary's or letter's contents. This is usually a rule of government-created intellectual property law, and nothing in the First Amendment prohibits it.⁴⁰ Similarly, nothing in the First Amendment should

³⁸ *Gelbard v United States*, 408 US 41, 52 (1972).

³⁹ There appears to be an inconsistency in how Justice Stevens characterizes the weight of the interest in protecting privacy. At the outset of his opinion, Justice Stevens states that "the interest in individual privacy" is an interest "of the highest order." 121 S Ct at 1756. But once he announces that the governing legal standard is the *Daily Mail* standard requiring the government to show a "need of the highest order" to justify regulating the media, he stops characterizing the government's interest in protecting privacy as having that rank. Instead, at the point where he assesses the government's argument that punishing media disclosures prevents compounding the harm from the illegal interception (the government's strongest argument), Justice Stevens starts calling the protection of privacy of communication only "an important interest," *id.* at 1764, obviously something less than "an interest . . . of the highest order." He nowhere reconciles the inconsistency.

⁴⁰ Copyright law, as well as the common law, have long protected private letters from unauthorized publication. See *Salinger v Random House, Inc.*, 811 F2d 90, 94 (2d Cir 1987); *Birnbaum v United States*, 436 F Supp 967, 978-82 (EDNY 1977); David Nimmer, *Nimmer on Copyright* § 5.04 at 5-57 (1999). Far from being barred by First Amendment principles of free expression, copyright law is understood as itself "an engine of free expression." *Harper & Row, Publishers, Inc. v Nation Enterprises*, 471 US 539, 558 (1985). Moreover,

prohibit the government from creating an analogous rule of privacy law in Title III.

It is significant that Title III limits its sanctions for disclosures to those “knowing or having reason to know that the information was obtained through [an illegal] interception.” First Amendment law properly reflects a concern about “timidity and self-censorship” by the press in the performance of its valued roles.⁴¹ But legitimate press activities will not be chilled by a rule that prohibits disclosures of material that reporters know was illegally obtained. And to the extent that the press becomes “timid and self-censoring” about publishing illegally intercepted material that invades people’s privacy, that is a good thing.

Title III’s prohibition on disclosures by those “having reason to know” that the information was illegally obtained is potentially more troublesome. This standard might leave reporters uncertain whether, after the fact, a trier of fact will conclude that they “had reason to know” even though they did not in fact know. This could chill the reporting of legally secured information out of fear that its origins will be misjudged. On the other hand, a “reason to know” standard, unlike a “should have known” standard, “imposes no duty of inquiry; it merely requires that a person draw reasonable inferences from information already known to him.”⁴² Significantly, in his briefs in the Supreme Court, the Solicitor General took pains to dispel any chill by strictly construing the “reason to know” provision.⁴³ Nevertheless, had the Court pointed to distinc-

copyright protection may not be ignored simply because the work “contains material of possible public importance” or there is “social value in dissemination,” *id* at 558, 559 (internal citations omitted). The fact that an author’s words “may of themselves be ‘newsworthy’ is not an independent justification for unauthorized copying of the author’s expression. . . .” *Id* at 557.

⁴¹ *Florida Star*, 491 US at 535; see *Bartnicki*, 121 S Ct at 1765 n 22; *New York Times Co. v Sullivan*, 376 US 254, 271–72 (1964).

⁴² *Novitski v Cook*, 946 F2d 938, 941 (DC Cir 1991).

⁴³ “Title III’s prohibition applies only to those who either have actual knowledge of the nature of the interception or actual knowledge of facts that make those origins ‘so highly probable that’ one should assume such to be true. Restatement (Second) of Torts, § 12, cmt. a (1965). Indeed, the facts surrounding the interception must be apparent, because Title III imposes no duty of inquiry. *Ibid.*; U.S. Br. 45–46. Consequently, Title III does not deter (and for the past three decades has not deterred) the press from reporting the news. Far from requiring reporters to research sources for fear of illegality, it merely requires them to refrain from use if they know or all but know that the source was an unlawful interception.” Reply Brief for the United States at 20, *Bartnicki v Vopper*, 121 S Ct 1753 (2001) (Nos 99–1687, 99–1728) (available at 1999 US Briefs LEXIS 1687).

tive First Amendment concerns with the “reason to know” standard, it would have highlighted a legitimate concern about chilling reporting that relies only on *legally secured* information; it would have rooted the decision in the right to report legally secured information, rather than extending the mantle of First Amendment protection over reporting information that the press knows to have been illegally secured. And of course it would not have invalidated the application of Title III in cases where the press actual knows that the information was illegally intercepted.

In the end, for Justice Stevens nothing turns on the fact that the information here was stolen. *New York Times Co. v Sullivan* put the mantle of First Amendment protection around the publication of factually false information, but not the publication of information the media knows to be false.⁴⁴ Neither should *Bartnicki* have protected the publication of information known to be illegally secured.

A case that hangs over *Bartnicki*, and may help to explain why Justice Stevens gives so little weight to the fact that the published information was illegally obtained, is *New York Times Co. v United States*,⁴⁵ the *Pentagon Papers* case. Justice Stevens invokes it at the very outset of his discussion of why it is irrelevant that the conversation was illegally intercepted.⁴⁶ Decided in 1971 when public debate about the ongoing Vietnam War was intense, the *Pentagon Papers* case was a suit by the U.S. government against *The New York Times* and *The Washington Post* to enjoin their publication of materials from a classified Defense Department study of the war. It was apparently undisputed that the newspapers were publishing classified material that they knew had been stolen and given to them by Daniel Ellsberg.⁴⁷ The *Pentagon Papers* case is a free press icon. How could the Court now rule that the press had no right to disclose illegally secured information?

But *Pentagon Papers* is easily distinguishable from *Bartnicki*. First, *Pentagon Papers* was a prior restraint case. The only issue before the Court was whether the publication of the papers could be en-

⁴⁴ 376 US 254, 279–80 (1964).

⁴⁵ 403 US 713 (1971).

⁴⁶ 121 S Ct at 1761.

⁴⁷ Although this fact was not discussed in the majority opinions, Justice Harlan emphasized it in his dissent. See 403 US at 754.

joined. Prior restraints are distinctively disfavored in First Amendment law, and the Court's per curiam opinion concluded only that the government had not met the "heavy burden" of justifying a prior restraint. Post-publication criminal prosecution of the newspapers was not foreclosed, as Justices White and Stewart explicitly noted in their concurrence⁴⁸—and, by implication, post-publication civil liability was also not foreclosed. *Bartnicki* was a post-broadcasting suit for damages, not a prior restraint case. Second, *Pentagon Papers* involved the publication of information held by the government. As noted above, in such a situation it can always be said that the government should take better steps to prevent the leak rather than allow actions against the press. Third, and most importantly, as Solicitor General Waxman put it in his oral argument in *Bartnicki*, in *Pentagon Papers* there was reason to think that the government had a "censorial motive" and was seeking "to take certain facts off the table."⁴⁹ In *Bartnicki*, nothing like a censorial motive underlies the content-neutral privacy-protection provisions of Title III.

In the end, the crucial factor for Justice Stevens in *Bartnicki* is that the content of the illegally intercepted conversation involves a matter of "public concern." The presence of content of "public concern," he argues, "implicates the core purposes of the First Amendment" and outweighs people's interest in the privacy of their communications even in a case where that privacy is violated by an illegal intrusion.

There are several interrelated problems with the "public concern" concept in this context⁵⁰ and, taken together, they leave private matters very vulnerable to disclosure. First, the phrase "public concern" is undefined. "Public concern" might include anything that the public becomes concerned about. This might involve a threat to public security or an issue being debated in the legislature; but it might also include the way an actor treats his girlfriend, what government officials say to their children, or what ordinary

⁴⁸ Id at 735–40 (White, joined by Stewart, concurring).

⁴⁹ 2000 US Trans LEXIS 77, *17.

⁵⁰ The phrase has been used in other contexts such as cases involving the scope of public employee speech, where it raises somewhat similar issues. See, e.g., *Connick v Myers*, 461 US 138 (1983); *Pickering v Board of Education*, 391 US 563 (1968); *Rankin v McPherson*, 483 US 378 (1987); *Waters v Churchill*, 511 US 661 (1994).

citizens buy from online sellers of videos—indeed, anything that becomes a matter of public curiosity.⁵¹

Even if “public concern” excludes mere public curiosity and includes only matters relevant to the public’s understanding of issues or officials, private matters can all too easily come within the concept. For one thing, there is a self-fulfilling and ever-expanding quality to “public concern.” Private matters can become subjects of “public concern” simply by being labeled so in the media. If a newspaper discloses how a government official treats his children, it will become a matter of public attention, public debate, and, at least for some voters, an element in political assessments. More generally, private matters can readily be deemed relevant to public concerns. Disclosure of private facts about virtually anyone can be said to enhance public understanding about some wider public phenomenon or public issue. If the relevance of a private fact to some public concern is sufficient to justify media publication, a justification will not be hard to give. An important cultural fact fuels this dynamic: we live in a prurient culture, with great public interest in other people’s private lives, and certainly not only the private lives of “public figures.” In these circumstances, “public concern” becomes an especially wide category, and, as a First Amendment justification, one that greatly endangers privacy.

But there is a more basic problem with Justice Stevens’s approach: He looks to the content of the broadcast communication to decide whether the Constitution protects it, rather than to the circumstances under which the conversation took place. For Justice Stevens, if the content of the communication involves a matter of public concern, it is within First Amendment protection. But a different approach is possible: One could look to whether the original communication takes place within a protected zone. If a zone is deemed a protected private zone—which can be either a place or a kind of situation⁵²—then the content of what is communicated

⁵¹ See Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 Rutgers L Rev 41, 54–57 (1974) (“[The] weight to be given ‘the public interest in obtaining information’ should depend on whether the information is relevant to the public’s governing purposes. ‘Public interest,’ taken to mean curiosity, must be distinguished from ‘public interest’ taken to mean value to the public of receiving information of governing importance. There is [no First Amendment right] to satisfy public curiosity and publish lurid gossip about private lives.”).

⁵² See Lloyd Weinreb, *Your Place or Mine? Privacy of Presence Under the Fourth Amendment*, 1999 Supreme Court Review 253 (contrasting what he calls “privacy of place” and “privacy of presence”); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the*

within that zone would be irrelevant in deciding whether the First Amendment protects the media in reporting on it. The press could be sanctioned for publishing information about conversations within that zone, regardless of content.⁵³ In Title III, Congress sought to protect privacy by creating such a protected zone, and made intrusions on that zone illegal. The fact that a conversation involves a matter of “public concern” is not inconsistent with it also warranting the label “private” because it takes place within a private zone.

Put another way, speech acts must be understood in terms of audiences as well as content.⁵⁴ In our daily narrative transactions, we are always negotiating our relationship to an audience. Privacy is ultimately about our power to choose our audience. When privacy is invaded, we are compelled to have an audience we do not want. The Court in *Bartnicki* says that publishing the intercepted conversation contributed to public debate—but the two people speaking on their cell phones did not wish to contribute to a public debate before a public audience. Their words were taken from them by stealth and put into public debate against their will. If every private statement on a public subject may be forcibly disclosed because it contributes to public debate, then privacy is a dead letter. We cannot have it both ways.

Justice Stevens’s approach, which analyzes “public” and “private” as a matter of content, is far less privacy-protective in this context than an approach that analyzes “public” and “private” as

Common Law Tort, in *Constitutional Domains: Democracy, Community, Management* 54–55, 72–73 (1995) (discussing Erving Goffman’s concept of “information preserves”).

⁵³ This approach is somewhat analogous to the approach under Fourth Amendment law. The existence of a zone of reasonably expected privacy generates more demanding requirements before that zone may be searched. The existence within that zone of particular “content” (evidence of criminal behavior) does not generally eliminate the need to observe the Fourth Amendment requirements. In the end, of course, “content” is certainly relevant under the Fourth Amendment, however. The requirements can be met, warrants will issue, and searches be allowed if law enforcement officers demonstrate that there is probable cause to believe that particular “content” (evidence of criminal behavior) actually does exist within the zone. But the existence of the zone generates the heightened requirements.

Similarly, one can view copyright law as creating a zone that is protected without regard to content. As noted above, the fact that an author’s words “may of themselves be ‘newsworthy’” is not an independent justification for unauthorized copying of the author’s expression” *Harper & Row, Publishers, Inc. v Nation Enterprises*, 471 US 539, 557 (1985); *id.* at 558, 559; note 40 above. See also *Seattle Times Co. v Rhinehart*, 467 US 20 (1984).

⁵⁴ See, e.g., Roman Jakobson, *Closing Statement: Linguistics and Poetics*, in Thomas Sebeok, ed., *Style in Language* 353–58 (1960); Peter Brooks and Paul Gewirtz, eds, *Law’s Stories: Narrative and Rhetoric in the Law* (1996).

a matter of zones and audiences.⁵⁵ It also makes the First Amendment standard itself content based—an ironic result given the fact that content-based rules are generally most vulnerable to First Amendment invalidation. The end result of Justice Stevens’s approach is that it matters not at all that the communication here took place with the expectation that it would be private. Because of its content, the press is free to disclose it (so long as the press itself did not participate in the unlawful interception). The press is as unlimited in reporting the private conversation as it would be if the speakers were talking at an open public meeting.

Although Justice Stevens labels his decision “narrow,”⁵⁶ his opinion gives no indication about what legislative efforts to protect privacy against media intrusion would be constitutional. The media wins this case because a matter of “public concern” was involved, but Justice Stevens refuses to say that the media would have lost if a private matter was involved:

We need not decide whether [the privacy interest] is strong enough to justify the application of [Title III] to disclosures of trade secrets or domestic gossip or other information of purely private concern. Cf. *Time, Inc. v. Hill*, 385 U.S. 374, 387–88 (1967) (reserving the question whether truthful publication of private matters unrelated to public affairs can be constitutionally proscribed).⁵⁷

Elsewhere in his opinion, Justice Stevens emphasizes “this Court’s repeated refusal to answer categorically whether truthful publication may *ever* be punished consistent with the First Amendment.”⁵⁸ These “do not decides” and “refusals to answer” mean that Justice Stevens is leaving open everything that is distinctive about protecting privacy, because protecting a person’s privacy is not limited to preventing publication of false statements (traditionally the realm of defamation law), but involves preventing the publication of true material that is justifiably private. If it is uncertain “whether truthful publication may ever be punished consistent with the First

⁵⁵ In other contexts, however, it might end up being more privacy protective. A “zone” approach might grant the press protection to publish photographs of any person in the public space. But see text accompanying note 149. A content approach might withhold protection if the photograph did not have content of public concern.

⁵⁶ 121 S Ct at 1756.

⁵⁷ Id at 1764.

⁵⁸ Id at 1762 (emphasis added).

Amendment,” it is uncertain whether media disclosures infringing on privacy can ever be limited consistent with the First Amendment. In other words, the Court’s opinion does not mark out any area in which privacy trumps media prerogatives.⁵⁹

II

At the outset, though, I said that *Bartnicki* takes steps forward in privacy protection, and that is because Justice Stevens’s opinion is “for the Court” only in name. Justice Breyer, joined by Justice O’Connor, wrote a concurring opinion. Although Justices Breyer and O’Connor also joined Justice Stevens’s opinion to make up a six-member majority, in fact their separate opinion is much less speech protective, and much more privacy protective, than the Stevens opinion. Because Chief Justice Rehnquist, Justice Scalia, and Justice Thomas dissented in an opinion that would have upheld the limitations on the media here and is broadly protective of privacy, the Breyer opinion is determinative. The controlling law is Breyer’s law.

Justice Breyer’s opinion sets forth an analysis that is different from Justice Stevens’s on almost all of the key matters except for the result, that points to a quite narrow constitutional immunity for the media in privacy cases, and that further develops his evolving and innovative general approach to the First Amendment. As Breyer analyzes the press versus privacy issue in *Bartnicki*, there are constitutional interests “on both sides of the equation.”⁶⁰ On

⁵⁹ These statements by Justice Stevens are inexplicable for other reasons. In a variety of other circumstances, the Court has upheld sanctions on the press for publishing truthful information. See, e.g., *Cohen v Cowles Broadcasting Co.*, 501 US 663 (1991) (First Amendment does not bar a promissory estoppel action against a newspaper for publishing truthful information about the source of a political news story in breach of its promise to keep the source’s identity confidential); *Harper & Row, Publishers, Inc., v Nation Enterprises*, 471 US 539 (1985) (First Amendment does not bar an action against a magazine for publishing truthful copyrighted material); *Zacchini v Scripps-Howard Broadcasting Co.*, 433 US 562 (1977) (First Amendment does not “immunize the media [from damage liability] when they broadcast a performer’s entire act without his consent”); *Seattle Times Co. v Rhinehart*, 467 US 20 (1984) (First Amendment does not bar an action against a newspaper for publishing truthful information learned during discovery in a civil suit that was covered by a protective order).

⁶⁰ 121 S Ct at 1766 (quoting his earlier separate opinions in *Turner Broadcasting System, Inc. v Federal Communications Commission*, 520 US 180, 227 (1997) (Breyer concurring in part), and *Nixon v Shrink Missouri Government PAC*, 528 US 377, 402 (2000) (Breyer concurring)).

one side is the media's constitutionally rooted interest in publishing what it wishes. On the other side is a privacy interest "that includes not only 'the right to be let alone' . . . but also 'the interest . . . in fostering private speech.'" ⁶¹ "The assurance of privacy," Breyer emphasizes, "helps to overcome our natural reluctance to discuss private matters when we fear that our private conversations may become public. And the statutory restrictions [in this case] consequently encourage conversations that otherwise might not take place."⁶²

This interest in fostering private speech, Breyer says, is itself a "constitutional interest" related to the system of free expression guaranteed by the First Amendment. Breyer cites his own previous separate opinions in which he characterizes the First Amendment's purposes in affirmative terms, such as "encouraging . . . open discussion," rather than simply as a prohibition on state action restricting speech.⁶³ Thus, Breyer says, there are "competing constitutional interests"⁶⁴ in *Bartnicki*, and competing constitutional interests related to free expression itself. Justice Stevens, by contrast, avoids saying that the interest on the privacy side is itself of "constitutional" dimension. Rather, he says only that "there are important interests to be considered on both sides of the constitutional calculus."⁶⁵ Justice Breyer himself hedges in one significant respect: Although he recognizes that the privacy interest includes both the "the right to be let alone" and "the interest . . . in fostering private speech," he labels only the speech-related aspect of privacy a constitutional interest and focuses his analysis on this speech-related aspect—leaving unclear how he would evaluate a case where only the nonspeech aspects of privacy were on the "other side of the equation."⁶⁶

⁶¹ Id (citations omitted).

⁶² Id.

⁶³ *Nixon v Shrink Missouri Government PAC*, 528 US at 402; *Turner Broadcasting System, Inc. v Federal Communications Commission*, 520 US at 227. The relationship between Breyer's general conception of the First Amendment and the traditional conception is discussed further in Part IV.

⁶⁴ 121 S Ct at 1766.

⁶⁵ Id at 1764.

⁶⁶ There are suggestions in his opinion that Justice Breyer is in fact giving weight to those nonspeech aspects of privacy. "As a general matter," Justice Breyer says, "the Federal Constitution must tolerate laws of this kind because of the importance of these *privacy and speech-related objectives*." And the basic standard that Justice Breyer uses in deciding this case is to ask whether the "restrictions on speech . . . are disproportionate when measured

Because Justice Breyer sees “competing constitutional interests” on both sides, he concludes that the Court should not apply “strict scrutiny.” Rather, he would use a much more flexible and multifaceted approach that gives greater leeway for protecting privacy:

I would ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences. Or do they instead impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits?⁶⁷

Breyer then explains why the statute here “enhances private speech,”⁶⁸ prevents “serious harm” to privacy,⁶⁹ and “resemble[s] laws that would award damages caused through publication of information obtained by theft from a private bedroom.”⁷⁰ In light of this, Breyer concludes, “As a general matter, despite the statutes’ direct restrictions on speech, the Federal Constitution must tolerate laws of this kind because of the importance of these privacy and speech related objectives.”⁷¹ The phrasing of this conclusion is in direct, and presumably intended, contrast to Justice Stevens’s statement that “As a general matter, ‘state action to punish the publication of truthful information seldom can satisfy constitutional standards.’”⁷²

In the end, however, Justices Breyer and O’Connor decide for the media, but only on the narrowest of grounds, and only with a clear endorsement of the power of legislators to take significant

against the corresponding *privacy and speech-related benefits*.” Id at 1766, 1767 (emphasis added). Thus, “privacy” benefits that are not “speech-related” appear to have some independent weight in the constitutional balance. Presumably, Justice Breyer is leaving open the possibility that he would uphold government action to protect privacy from media infringement where only the nonspeech aspects of privacy are involved, even though they are not themselves a “constitutional interest,” just as in other cases he has concluded that nonspeech (and nonconstitutional) interests can sometimes justify a restriction on speech. See text accompanying notes 176–78.

⁶⁷ 121 S Ct at 1766.

⁶⁸ Id at 1766–67.

⁶⁹ “Media dissemination of an intimate conversation to an entire community will often cause the speakers serious harm over and above the harm caused by an initial disclosure to the person who intercepted the phone call.” Id at 1766.

⁷⁰ Id at 1767.

⁷¹ Id.

⁷² Id at 1761 (citation omitted).

steps to protect privacy from media incursions. For Justice Breyer, there are two reasons why the media win this case. First, as Justice Stevens also had emphasized, the broadcaster was not involved in the illegal interception. Breyer suggests a further narrowing of the Stevens approach, however, by implying that Congress might have been able to reach the media in *Bartnicki* if it had made “receipt” of the illegally intercepted tape unlawful.⁷³

Second, Justice Breyer says, “the information publicized involved a matter of *unusual* public concern, *namely a threat of potential physical harm to others*.”⁷⁴ This formulation is much narrower than the one used by Justice Stevens. Far from relying on a general “public concern” rationale to outweigh the privacy interests here, as Stevens does, Breyer emphasizes that the public concern in this case was an “unusual” and “special” one involving “threats to public safety,” since one of the overheard speakers suggested “blow[ing] off . . . front porches” and “doing some work on some of these guys.”⁷⁵ One might question whether these remarks should be interpreted as a true and continuing threat.⁷⁶ But the

⁷³ The meaning of the relevant passage on “receipt” is somewhat uncertain. In the context of explaining that the media “engaged in no unlawful activity other than the ultimate publication,” *id.* at 1767, Breyer says: “[A]s the Court points out, the statutes do not forbid the receipt of the tape itself. *Ante*, at 9. The Court adds that its holding ‘does not apply to punishing parties for obtaining the relevant information *unlawfully*.’ *Ante*, at 17 n.19 (emphasis added).” *Id.* The implication seems to be, although this is not certain, that punishing the receipt in these circumstances might be constitutional even if punishing “the ultimate publication” is not. Justice Breyer quite clearly seems to consider “obtaining” to include “receipt.” However, the full text of Justice Stevens’s footnote 19 suggests that he is probably using “obtaining” to mean no more than directly stealing or intercepting the information. Footnote 19 seems simply to make explicit that “of course” it would be “frivolous” to assert that the First Amendment protects such direct intrusions even by the press.

In any event, it is hard to see why this case should be decided differently if Congress had made the “receipt” of illegally intercepted information itself unlawful. Congress has made unlawful both the “interception” of certain electronic communications and the “disclosure” of that intercepted information. Why should the constitutionality of these provisions depend on whether an interim step between the unlawful interception and the unlawful disclosure is also explicitly made unlawful?

⁷⁴ *Id.* at 1766 (emphasis added).

⁷⁵ *Id.* at 1766, 1767, 1768.

⁷⁶ Perhaps anticipating such a question, particularly when that characterization is key to resolving a motion for summary judgment, Justice Breyer adds: “Nor should editors, who must make a publication decision quickly, have to determine present or continued danger before publishing this kind of threat.” *Id.* at 1768.

It is also reasonable to ask whether it would be more appropriate to report the threat, if there was believed to be one, to law enforcement authorities. It is not settled, however, that Title III would permit this “disclosure” any more than it permits media publication. Several lower court cases have construed Title III to prohibit certain disclosures of illegally intercepted material to law enforcement entities. *In re Grand Jury*, 111 F3d 1066, 1077–

crucial point for present purposes is that Justice Stevens nowhere mentions this “unusual” and “special” public safety rationale at all.⁷⁷ Instead he focuses exclusively on the fact that the intercepted phone call involved a “public issue”—“the months of negotiations over the proper level of compensation for teachers . . . were unquestionably a matter of public concern, and respondents were clearly engaged in debate about that concern.”⁷⁸ Again and again, Justice Stevens uses the unadorned phrase “public concern,” never suggesting that he would limit First Amendment protection in cases of unlawful interception to disclosures involving “unusual” or “special” types of public concern. By contrast, Justice Breyer explicitly disclaims “a ‘public interest’ exception that swallows up the statutes’ privacy-protecting general rule.”⁷⁹ “Here,” Breyer says, “the speakers’ legitimate privacy expectations are unusually low, and the public interest in defeating those expectations unusually high. . . . I emphasize the particular circumstances before us because, in my view, the Constitution permits legislatures to respond flexibly to the challenges future technology may pose to the individual’s interest in basic personal privacy.”⁸⁰

The privacy-protective nature of Justice Breyer’s approach is also reflected in how he treats the fact that the speakers, officials in a public employees’ union, were actively involved in public life. Considering this an additional, although not necessarily independent, factor in his analysis, Breyer characterizes the speakers as “limited public figures, for they voluntarily engaged in a public

79 (3d Cir 1997); *Berry v Funk*, 146 F3d 1003, 1011–13 (DC Cir 1998); *Chandler v United States Army*, 125 F3d 1296, 1298–1302 (9th Cir 1997). Indeed, when Justice O’Connor was a state judge in Arizona, she had such a case. *State v Dwyer*, 585 P2d 900 (Ariz App 1978) (affirming Judge O’Connor’s suppression, in a homicide case, of a privately intercepted telephone conversation that had been given to law enforcement authorities). In his Reply Brief in *Bartnicki*, the Solicitor General, addressing disclosures to the police, stated that “the traditional defense of ‘necessity’ privileges conduct that is necessary to protect lives where (as here) the defense is not foreclosed by statute.” Reply Brief for the United States at 19, *Bartnicki v Vopper*, 121 S Ct 1753 (2001) (Nos 99-1687, 99-1728) (available at 1999 US Briefs LEXIS 187). Justice Breyer himself suggests that there is a broader “privilege allowing the reporting of threats to public safety,” not limited to reporting those threats to law enforcement officials. 121 S Ct at 1768.

⁷⁷ He does quote this part of the intercepted conversation in his opinion’s statement of facts, *id* at 1757, but makes nothing of it in the remainder of his opinion.

⁷⁸ *Id* at 1765.

⁷⁹ *Id* at 1768.

⁸⁰ *Id*.

controversy.”⁸¹ But whereas Justice Stevens flatly states that “one of the costs of participation in public affairs is an attendant loss of privacy,”⁸² Justice Breyer states that public involvement may produce only “*somewhat* greater public scrutiny and . . . a *lesser* interest in privacy.”⁸³

Justice Breyer then explicitly rejects the idea that “the Constitution requires anyone, including public figures, to give up entirely the right to private communication.”⁸⁴ And he goes on to cite a number of lower court cases and authorities advocating privacy protection for public figures—emphasizing, in pointed parentheticals following each case or authority, that even where someone “famous” is involved or there is “interest of [the] public,” publication of certain private matters does not involve a “*legitimate* public concern.”⁸⁵ This distinction between “public concern” (Stevens’s phrase) and “legitimate public concern” (Breyer’s phrase⁸⁶) significantly narrows the media’s leeway. It makes clear that simply because there is a public interest in something does not justify its disclosure to the public. A normative judgment must be made, one that limits the potential breadth of the “public concern” concept. A public concern is not “legitimate” if it intrudes too far into other people’s privacy.

Justice Breyer’s short opinion does not set forth criteria for determining whether a matter involves a “legitimate” and “unusual” public concern. The threat to public security in this case, he says, comes within those categories, and he distinguishes this from the “truly private matters” in two lower court cases involving a “video-tape recording of sexual relations” and certain personal informa-

⁸¹ *Id.* The concept of “public figures” and “private figures” has been especially important in cases assessing the place of the First Amendment in defamation actions after *New York Times Co. v. Sullivan*, 376 US 254 (1964). See, e.g., *Philadelphia Newspaper, Inc. v. Hepps*, 475 US 767 (1986); *Wolston v. Reader’s Digest Assn., Inc.*, 443 US 157 (1979); *Time, Inc. v. Firestone*, 424 US 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 US 323 (1974).

⁸² 121 S. Ct. at 1765.

⁸³ *Id.* at 1768 (emphasis added).

⁸⁴ *Id.*

⁸⁵ *Id.* (emphasis added).

⁸⁶ Breyer takes the phrase from Warren and Brandeis’s famous article on privacy, 4 Harv L. Rev. at 214 (cited in note 1), and it appears in Section 652D of the Restatement (Second) of Torts (1977), which establishes liability for those who “give[] publicity to a matter concerning the private life of another . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is *not of legitimate concern to the public.*” (Emphasis added.)

tion about a divorce. But his category of “truly private matters” appears to be at a polar extreme from matters of “unusual” public concern, so Breyer’s boundary and the criteria for drawing it remain uncertain. Nevertheless, Breyer’s requirement that there be both “legitimate” and “unusual” public concern to establish the media’s First Amendment right in this context promises substantial protection for privacy.

Justice Breyer’s opinion, therefore, leaves us very far from Justice Stevens’s refusal to say “whether the truthful publication of private matters unrelated to public affairs can be constitutionally proscribed,”⁸⁷ and “refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment.”⁸⁸ Justice Breyer is clear that truthful publication can be punished in order to protect privacy.⁸⁹

Justices Breyer and O’Connor do not go as far as the dissenters. The dissenters, using “intermediate scrutiny,” treat the unlawfulness of the original interception as dispositive.⁹⁰ The dissenters would give no weight in this context to the fact that the intercepted information might involve information of “public concern,” whether the public concern is ordinary or “unusual.” They call “public concern” “an amorphous concept that the Court does not even attempt to define.”⁹¹ In the most important passage in their opinion, the dissenters embrace a privacy-protection approach that

⁸⁷ 121 S Ct at 1764.

⁸⁸ Id at 1762.

⁸⁹ Justice Breyer gives an interesting gloss on his own *Bartnicki* opinion in his recent Madison Lecture. Stephen Breyer, *Our Democratic Constitution*, the Fall 2001 James Madison Lecture, delivered at NYU Law School on October 22, 2001 (copy on file with the author). He characterizes the *Bartnicki* decision as a “narrow” one and argues that the narrowness was appropriate because privacy questions are now “unusually complex.” “[T]he complex nature of these problems calls for resolution through a form of participatory democracy,” with “law revision that bubbles up from below.” This, in turn, “suggests a need for . . . judicial caution or modesty” that does not “pre-empt” the democratic process. Id at 14–17. This is not just a general defense of narrow decisions in this area, however. It is pointedly an argument for narrowness in decisions in a particular direction—decisions that protect the media and limit the scope of privacy protection. The point is that the Court should “leav[e] open broadcaster liability in other . . . circumstances,” id at 16, and allow the participatory democratic process to take privacy-protective steps.

⁹⁰ They do distinguish the *Pentagon Papers* case, however, saying that that case involved government information and was also a “prior restraint” case, rather than concluding that it was wrongly decided simply because Daniel Ellsberg had stolen the papers. 121 S Ct at 1776.

⁹¹ Id at 1769.

is undoubtedly broader than the multifactored complexity of the Breyer approach:

The Constitution should not protect the involuntary broadcast of personal conversations. Even where the communications involve public figures or concern public matters, the conversations are nonetheless private and worthy of protection. Although public persons may have forgone the right to live their lives screened from public scrutiny in some areas, it does not and should not follow that they also have abandoned their right to have a private conversation without fear of it being intentionally intercepted and knowingly disclosed.⁹²

The Stevens and Breyer opinions, taken together, extend First Amendment immunity beyond prior cases in some respects, covering situations where the information was unlawfully obtained. But the Breyer and Rehnquist opinions, taken together, contract and limit First Amendment protections in several other respects, most obviously in sharply limiting the media's "public concern" rationale for invading privacy. Overall, the combined weight of the concurrence and the dissent establishes that five Justices seem quite receptive to restrictions on speech to protect privacy.

III

This broader receptivity to privacy protection is as it should be, in my judgment. The Court should give more weight to privacy protection in cases involving privacy-speech conflicts. This conclusion reflects not only a view of the importance of privacy, but also concerns about new technological threats to privacy and about contemporary social circumstances that have made privacy more vulnerable than speech. Ultimately, it also reflects a conception of freedom of the press as largely a freedom concerned with the public sphere.

1) The values served by privacy (understood here as the ability to control and to avoid disclosure of certain matters about oneself) are many and can be variously described: the need to be let alone; promoting development of the personality; developing trusting relationships of love and friendship; avoiding pressures for conformity; encouraging creativity; maintaining the rules of civility;

⁹² Id at 1776.

allowing noncompliance with ambivalently supported laws; reducing unfair, out-of-context judgments of people; letting people bury their past; protecting human dignity; sustaining individualism; and developing a liberal and pluralistic society, to mention just some that have been discussed in the literature.⁹³ Privacy also promotes a system of free expression, for people are more likely to express themselves fully, openly, and robustly when they have confidence that what they say will be heard only by a known group of listeners. Fear of being overheard, fear of public exposure, fear of one's words becoming the subject of gossip, fear of intimacies being publicly scrutinized, fear of being sanctioned or disapproved of because of what one says—all of these have a profound inhibiting effect on expression, and make it crucially important for the law to protect a realm of privacy for communications. Far from threatening speech, protecting private communication is itself a central part of constructing a vibrant system of free expression.

Given the special status of free speech in the American constitutional firmament, it is easiest to argue for readjustments in the speech/privacy balance by emphasizing the ways in which protecting privacy itself promotes free expression. By doing so, one identifies speech interests “on both sides of the equation,” and restricting speech to protect privacy can be justified as a speech-enhancing rather than a speech-restricting approach.⁹⁴ But not all concerns about privacy are related to expressive freedom. The other values that privacy serves may themselves at times be strong enough to justify some restriction on what the media may publish.

We need to see privacy in the same systemic way that we have come to see speech. Suppressing speech, we recognize, is not only a loss to the individual in question. It also deprives public debate and deliberation of the benefits of wide-open and robust discussion; it harms democratic self-government. Similarly, lost privacy is not only a diminishment to the individual directly concerned. It also reduces a sphere of life that is crucial for a particular kind

⁹³ See, e.g., Warren and Brandeis, 4 Harv L Rev 193 (cited in note 1); Ruth Gavison, *Privacy and the Limits of Law*, 89 Yale L J 421 (1980); Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (2000); Post, *The Social Foundations of Privacy* (cited in note 52); Charles Fried, *An Anatomy of Values* (1970); Amitai Etzioni, *The Limits of Privacy* (1999); Richard C. Turkington and Anita L. Allen, *Privacy Law: Cases and Materials* (1999); Spiros Simitis, *Reviewing Privacy in an Information Society*, 135 U Pa L Rev 707 (1987).

⁹⁴ 121 S Ct at 1766 (Breyer concurring).

of human functioning that sustains a pluralistic society. Moreover, when the media puts private matters into the public sphere, it has systemic consequences for the public sphere itself.

Those who do not participate in the public square at all can make the strongest claims to privacy protection. People only tangentially or episodically in the public eye—or those who have been forced into the public square because they are victims of crime or some other misfortune—also have strong claims. Cases involving public figures are the hardest privacy cases, since public figures seem to want it both ways, to embrace the public and yet evade it, and because the accountability of public officials and political candidates is a central element of democratic self-governance. But protecting some aspect of privacy for public figures is crucial for their own human functioning. Moreover, as discussed more fully below, protecting their privacy can further the values of democratic self-governance.⁹⁵

But while privacy serves public values, at bottom privacy is anti-public. This is part of what makes it such a challenging concept for contemporary constitutional and political theory, and why many are reluctant to say that privacy should outweigh the public functions of a free press. Owen Fiss has written about a number of recent circumstances in which traditional supporters of free speech have supported restrictions on speech.⁹⁶ He discusses, for example, feminist support for restricting pornography in spite of liberalism's traditional support for freedom of sexual expression, support for hate speech laws among many in the civil rights movement in spite of their traditional opposition to censorship, and support of some civil liberties groups for campaign finance restrictions and regulations of the media to assure wider access and enhance the diversity of views available to the public. Some of these examples pit different conceptions of free speech against each other. Others, such as hate speech and pornography, can be seen as a conflict between free speech and equality, although Fiss sees them as a conflict within the First Amendment itself. But in each case, the argument in favor of restricting speech rests at bottom on a conception of the "public"—a revised sense of public debate, or

⁹⁵ See text accompanying notes 120, 135–36.

⁹⁶ Owen M. Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (1996). See also Owen M. Fiss, *The Irony of Free Speech* (1996).

collective self-determination, or social roles, or social status. As Fiss puts it, these arguments in favor of restricting speech rest on an understanding of freedom “in more social terms.”⁹⁷

But the arguments in favor of restricting speech to protect privacy are largely anti-“social”—or at least they seek to preserve a realm of the social and personal that often refuses to contribute to a wider “public.” “Private speech” might be related to public issues or might be preparation for an ultimately more “public” formulation, but its value does not depend only on that, and that is not the primary reason we protect it from disclosure. We protect its privateness. We protect the right to choose a narrow audience, or no audience except oneself—to be what William Carlos Williams called “lonely, lonely,” and as such to be “the happy genius of my household.”⁹⁸ So too for the elements of privacy having nothing to do with speech—we protect them from disclosure largely because we know that humans are constituted in part by refusing to be public. One can and should identify public purposes served by protecting the private, as I have done above, but privacy’s effort to subvert the public’s knowledge and control is at the core of what it is—and, I believe, the core of its unique value.

2) In assessing the importance of enhancing privacy protection, we also need to take account of technological developments that create greater society-wide threats to privacy. It is appropriate and common for legal rules to adapt to the development of new technologies.⁹⁹ This is because legal rules are typically premised on often unarticulated background assumptions about what the world is like. When reality changes, and the background assumptions no longer hold true, existing law may not achieve its original purposes. If we adhere to existing rules in the face of new technologies, the existing balance between liberty and order may be transformed. Concerning privacy, for example, the law may not protect certain private activities or zones because there are few perceived threats to those activities or zones. The law allows access, but since access in practice is rare, the law does not occasion significant inva-

⁹⁷ Fiss, *Liberalism Divided* at 5.

⁹⁸ William Carlos Williams, *Danse Russe*, in A. Walton Litz and Christopher MacGowan, eds., *The Collected Poems of William Carlos Williams 1909–1939* at 86–87 (1986).

⁹⁹ See Paul Gewirtz, *Constitutional Law and New Technology*, 64 *Social Research* 1191 (1997).

sions of privacy. Our technological crudity protects us from wider invasions of privacy. But if new technologies create new capabilities that facilitate access and therefore open up new threats to privacy, we may have to change the rules if we wish to preserve the old rules' purposes.

Another privacy case decided last term, *Kyllo v United States*,¹⁰⁰ nicely illustrates one way that legal rules adapt to new technologies—specifically, adapt to what the Court described as the “power of technology to shrink the realm of guaranteed privacy.”¹⁰¹ *Kyllo* involved the police use of a “thermal-imaging” device in the course of a drug investigation. When aimed at a building from outside, such a device can pick up relative amounts of heat emanating from the building. In *Kyllo*, a thermal-imaging device was aimed at a private home from the street and was able to pick up hot zones suggesting that halide lights were being used inside to grow marijuana. The constitutional question was whether use of the device was a “search” within the meaning of the Fourth Amendment.

The Court acknowledged that visual observation traditionally has not been deemed a “search,” but also underscored that individuals traditionally have had a reasonable expectation of privacy in “the interior of their homes.” With “old” technologies, the two concepts are not in conflict. But with the “technological enhancement of ordinary perception” permitted by the “advance of technology,” a conflict can emerge. The Court in *Kyllo* concluded that the use of thermal imaging on a house constitutes a “search,” even though observation from the same spot without “technological enhancement” would not have been a “search.”

To withdraw protection of this minimum expectation [of privacy] would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical “intrusion into a constitutionally protected area” constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against gov-

¹⁰⁰ 121 S Ct 2038 (2001).

¹⁰¹ Id at 2043.

ernment that existed when the Fourth Amendment was adopted.¹⁰²

Technological changes creating new threats to privacy should also affect legal rules in a broader way, encouraging reexamination of the rules governing the speech/privacy balance. As new technologies make outsiders' access to private matters easier (allowing ready interceptions of phone calls or eavesdropping on bedroom conversations or hacking into electronically stored information, for example), and as new technologies facilitate the creation of permanent electronic records and footprints and simplify the ability to gather personal information from dispersed sources, laws protecting privacy become more important. At the same time, the media has a greater potential to produce more extensive harms by broadly disseminating private material, and new media technologies such as the internet and e-mailing make possible new threats to privacy.¹⁰³ A continuing reluctance to limit the media in the face of new technologies, in short, may result in a major diminishment of privacy.¹⁰⁴ It may well be that in the years ahead further techno-

¹⁰² Id (citation omitted). The Court in *Kyllo* relies on an earlier case in which technological change fostered a change in Fourth Amendment doctrine, *Katz v United States*, 389 US 347 (1967). In *Katz*, the Court discarded a constitutional rule that the Fourth Amendment was triggered only by a physical trespass, in significant part because new electronic technologies were allowing widespread intrusions on areas where there was a reasonable expectation of privacy even without any physical intrusion.

¹⁰³ See A. Michael Froomkin, *The Death of Privacy?* 52 Stan L Rev 1461 (2000); Rosen, *The Unwanted Gaze* at 57–58, 159–95 (cited in note 93); Lawrence Lessig, *Code and Other Laws of Cyberspace* 142–64 (1999); Turkington and Allen, *Privacy Law* at 311–25 (cited in note 93).

¹⁰⁴ Cf. Geoffrey R. Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers*, 1966 Am Bar Found Res J 1193, 1216 (suggesting a “principle of conservation of privacy,” which seeks “to maintain a cumulative level of privacy comparable to that existing at the time the fourth amendment was drafted”). This point is a general one, and has often been lost in discussions about the tension between liberty and security after the events of September 11, 2001. Many of our civil liberties doctrines and rules rest on background assumptions about the risks to security that will follow from civil liberties of a certain scope. For example, when we say it is better that ten guilty people go free than that one innocent person be convicted, we are implicitly assuming that the risk to society of setting ten guilty people free is a tolerable risk. But if technologies and access to technologies develop so that the ten guilty people have access to footlocker-sized nuclear weapons and the will to detonate them, then we may want to adjust our epigram (and at least some of our rules in some circumstances). Not to do so is to end up with a real-world balance between liberty and security that is very different from the one we started with. The point is just as applicable in the other direction. If we do not adjust existing rules when new investigative technologies give law enforcement officials much greater capacity to reduce liberty, then we will end up with a much different liberty/security balance than we thought we had. Liberty-oriented rules of wider scope will be necessary just to keep pace.

logical developments will themselves create better ways of advancing communication while also protecting privacy—for example, by strengthening encryption methods—but for now privacy protections will be significantly shaped by where the law draws the line between permissible and impermissible invasions.

3) Giving more weight to privacy in constitutional disputes is also warranted because of the contemporary social and cultural context within which these issues arise. Just as legal rules are typically premised on background assumptions about technologies, so too are such rules usually premised on assumptions about social conditions, behaviors, and attitudes. As these change, legal rules may require reexamination. Often in partnership with new technologies, social and cultural factors have made privacy more vulnerable than before—and, I would argue, more vulnerable than the press today—suggesting that legal efforts to strengthen privacy deserve added weight when balanced against press prerogatives. The events of September 11, 2001, and ongoing fears of terrorism will continue to augment the government's already great powers to collect information and monitor behavior. Employers have become expansive data gatherers and monitors. Legally, as well as culturally, there is a wider sense of a "right to know." The greater role of litigation in our society over past decades has created a new and extremely powerful engine to compel the disclosure of hitherto private information. A wider "politics of scandal" and "criminalization of politics" has unleashed powerful investigative machinery and increased mainstream attention to the private misdeeds of public figures and to the lives of private figures caught up in the investigative onslaught. I have elsewhere referred to an "Oprahfication" of American culture.¹⁰⁵ By this I mean that Americans have become ready and unashamed voyeurs, stimulated and allowed to peer into and judge the private lives of others, even as we typically try to hold on to our own privacy and support laws to protect it. Cultural boundaries between the public and private have become blurred, with private intimacies more casually the subject of public discourse, and new expectations created about what we may know about others.

The press itself has been changed by the more mainstreamed

¹⁰⁵ Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial*, in *Law's Stories* at 135, 152 (cited in note 54).

prurience of the American people, and in turn has become a greater cultural force in diminishing privacy.¹⁰⁶ It has often been noted that “entertainment values” drive news coverage these days,¹⁰⁷ and a large part of what this means is that news coverage has increasingly broken down distinctions between what is public and what is private. The mainstream media devote more attention to personalities, gossip, and reporting on private lives of both the famous and the ordinary. Although we may seek to hold on to our own privacy and support laws to protect it, these broader cultural forces, along with new technologies, present new and serious threats to privacy.

On the other hand, the press today is not seriously endangered by government restrictions, and individual speakers are not seriously threatened by government-imposed conformity of viewpoint. Debate about public issues and public figures is extremely vigorous. The boundaries of the permissible have been extended very far out. In earlier times, this was not the case: the press and other speakers were subject to government legal action that directly sought to restrict criticism of the government and sought to limit a broad range of ideas from being expressed and heard. Understandably, free speech law sought to push back on these restrictions. But the press today has great leeway and boldness. It is true that the terrorist attacks of September 11, 2001, and the resulting war in Afghanistan have led the current administration to criticize the media—for example (and disturbingly), the Attorney General has criticized the media and others for giving “aid” to terrorists by their “fearmongering” objections to administration policies on civil liberties grounds.¹⁰⁸ But the government has taken no legal steps to restrict media criticism, and the media remains bold (although this popular war is also generally popular in the media). The system of free expression still needs to be strengthened—es-

¹⁰⁶ The point here is one of degree. Concerns about the press invading privacy and pushing boundaries in that direction are hardly new, of course. In a different social context where there were different cultural boundaries, Warren and Brandeis’s famous article on privacy expressed analogous sorts of concerns about press behavior.

¹⁰⁷ See, e.g., James Fallows, *Breaking the News* (1996); Neil Postman, *Amusing Ourselves to Death* (1985).

¹⁰⁸ *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism*, hearing before Senate Judiciary Committee, 107th Cong. 1 (2001) (testimony of Attorney General John Ashcroft, Dec. 6, 2001), available at <<http://www.usdoj.gov/ag/testimony/2001/1206transcriptsenatejudiciarycommittee.htm>>.

pecially by counteracting the dominance of media giants and further diversifying the voices that can be heard (without thereby diluting the power of strong press entities to be a true check on government¹⁰⁹)—but not by strengthening the press in its freedom to interfere with privacy. It is the latter value that is now often seriously threatened, and at times threatened by the press. In deciding how to strike the press/privacy balance, it is essential to take account of where the greater vulnerabilities and dangers are.

These various factors help to justify strengthening privacy protections. But freedom of the press from government abridgment is explicitly protected by the Constitution, and freedom from non-governmental interference with privacy is not.¹¹⁰ There are only two conceptual ways for privacy concerns to prevail in the face of the press' claim of First Amendment protection: (1) to conclude that the First Amendment right does not apply, or does not apply at full strength, when the press infringes on certain private matters; or (2) to conclude that privacy is a strong enough competing interest in particular circumstances to outweigh the First Amendment interest. Each conception is plausible, and indeed they are related.

The freedom of the press protected by the First Amendment must be seen as primarily about the press' contribution to democratic self-governance, to public debate, and to checking the power of the state.¹¹¹ This core freedom is a broad one, and it includes

¹⁰⁹ Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 Am Bar Found Res J 521 (1977).

¹¹⁰ A right to privacy as the freedom to keep the government from having unwanted access to personal information is protected through the Fourth Amendment and also as an aspect of substantive due process under the Fifth and Fourteenth Amendments. *Whalen v Roe*, 429 US 589 (1977). The Fourth Amendment is phrased as a "right of the people to be secure . . . against unreasonable searches and seizure," and, as literally phrased, does not have a state action requirement. But the Fourth Amendment has not been interpreted as providing protections against nongovernmental interference, and I do not rest my argument on a claim that media interference with "privacy" violates a constitutional right of privacy.

¹¹¹ The idea that the First Amendment as a whole has this core meaning has its contemporary roots in the writings of Alexander Meiklejohn, e.g., *Free Speech and Its Relation to Self-Government* (1948), and has been developed in recent years by Owen Fiss, e.g., *Liberalism Divided* (cited in note 96); *The Irony of Free Speech* (cited in note 96), and Cass Sunstein, *Democracy and the Problem of Free Speech* (1993). These writers do not distinguish between freedom of speech and freedom of the press. However, this understanding of the First Amendment seems to have distinctive force in understanding freedom of the press in particular, both because the institutional nature of media entities makes less relevant another standard rationale for free speech—promoting self-fulfillment—and, more importantly (as

not only explicitly “political” speech but also a broad range of “cultural” expression, since cultural expression contributes to our public life¹¹² and since experience teaches us that cultural censorship so often has a political motivation.¹¹³ This understanding of freedom of the press as primarily about the public sphere reflects both an affirmative concept about the press’ role and also, I would argue, a recognition that a wider concept of press freedom would conflict with other values that a society properly cherishes, such as privacy. Thus concern about privacy is built into a proper conception of press freedom itself. Freedom of the press is not fundamentally about the freedom to disclose private matters or to invade the private sphere.¹¹⁴ The freedom to publish the truth strikes many as the core of what freedom of the press is about; but truthful information about oneself is also at the core of what privacy protects. A plausible way to harmonize these ideas is to understand the press’ freedom as focused primarily on the public sphere.

The alternative way to bring privacy protection into the constitutional analysis is to see privacy as a value that competes with the value of a free press. This is a plausible way of proceeding as long as we accept that interests not explicitly protected by the Constitution (here, the interest in protecting privacy from nongovernmental interference) can in certain circumstances outweigh interests that are.¹¹⁵ In fact, almost all doctrinal “tests” in constitutional law

I note below), because a wider concept of freedom of the press would distinctively threaten privacy values.

¹¹² This was Alexander Meiklejohn’s rationale, *The First Amendment Is an Absolute*, 1961 Supreme Court Review 245, 255–57. For a criticism of Meiklejohn’s inclusion of culture, see Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind L J 1, 26–28 (1971).

¹¹³ See Sunstein, *Democracy and the Problem of Free Speech* at 135–36, 164–65 (cited in note 111). For a criticism of Sunstein’s view—indeed, a broader criticism of approaches that see the First Amendment’s primary purpose as promoting deliberation about public issues—see J. M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 Yale L J 1935 (1995).

¹¹⁴ What differentiates freedom of the press from freedom of speech is that the former typically involves an institution of production and distribution. Since wide distribution of information is usually the main threat to privacy protection, arguably “freedom of the press” poses a greater danger to privacy than “freedom of speech” *simpliciter*—and therefore particular care should be taken in defining what comes within the constitutional concept of freedom of the press or particular receptivity shown when privacy values are balanced against it.

¹¹⁵ There are countries in which both free press and privacy are explicitly protected by the Constitution—indeed, privacy is protected from both governmental and nongovernmental infringement. See text accompanying notes 140–55. In such countries it may not matter greatly which analytic route is followed and, in particular, whether a core conception of

reflect this, with, for example, “substantial” or “compelling” (but nonconstitutional) interests justifying restrictions on constitutional ones in certain circumstances. At bottom, under either approach, the task must be to reconcile protection for both a free press and for privacy, to reconcile protecting the need of the public to know with the competing need of individuals to keep things private. These are each things that we rightly cherish, and that the Constitution must be read as recognizing that we rightly cherish. Of course, “the right to be let alone [can] develop into an impediment to the transparency necessary for a democratic decisionmaking process.”¹¹⁶ But we must impose some limits on the transparency of the private, even where transparency might marginally enhance public deliberation, if we want to preserve a private sphere of meaningful scope.

In light of this, the concept of “public concern” is insufficient to mediate the press-privacy conflict. Superficially, this concept might appear to preserve the public/private distinction, but it does not. In fact, the notion that content of “public concern” justifies media attention protected by the First Amendment is an engine for destroying privacy. It is always possible to construct an argument that public knowledge about a “private” matter is relevant in some way to public understanding of public issues or public roles. It can always be said that some private fact is an exemplification of a wider public phenomenon and that informing the public about it will enhance public understanding.¹¹⁷ If identifying “relevance” to

free press is defined. Even a very broad conception of free press will have to be reconciled with or “balanced” against the privacy values protected elsewhere in the constitution itself. But in our Constitution, the stakes in understanding the rationale for protecting a free press may be higher, for in our press-privacy cases freedom of the press is the only explicit constitutional right in the picture.

¹¹⁶ Simitis, 135 U Pa L Rev at 731 (cited in note 93).

¹¹⁷ There are endless varieties of these kinds of weak and privacy-destroying nexus arguments. To give just one example from a well-known case, Judge Richard Posner upheld on First Amendment grounds the reporting about private facts about an ordinary citizen (as summarized by Posner, “his heavy drinking, his unstable unemployment, his adultery, his irresponsible and neglectful behavior toward his wife and children”) using the following argument in part: “Reporting the true facts about real people is necessary to ‘obviate any impression that the [general social] problems raised in the [reporting] are remote or hypothetical.’” *Haynes v Alfred A. Knopf, Inc.*, 8 F3d 1222, 1233 (7th Cir 1993). Obviously, if personal and embarrassing private facts (here, from thirty years previously) can be published simply because they establish that some general social problem is not remote or hypothetical, no one with “problems” has any protection from media disclosure. See also text accompanying note 128, discussing the way that the Restatement (Second) of Torts limits the privacy protections for “involuntary public figures.”

a “public concern” is sufficient to justify media publication, some relevance can always be found or created, and privacy will be only a matter of media grace and forbearance. To preserve some realm of the private from public disclosure, we need to develop more nuanced criteria, which inevitably will turn on matters of degree: how private, what degree of public significance, how much relevance between private fact and public concern, and so forth. Justice Breyer’s concept of “legitimate public concern” in *Bartnicki* is a recognition that a limiting normative judgment is required. The need for limiting criteria is even clearer once we appreciate that in this context the usual nostrum that the remedy for problematic speech is more speech has no applicability. More speech following disclosure of a private matter would only deepen the loss of privacy, not protect it.¹¹⁸ To permit the media to invoke “public concern” to justify publicizing private information means either that no one will fight back or that the fighting back will further undermine privacy.¹¹⁹

I would also argue that limiting invasion of the “private” actually enhances public debate. Information about the private lives of public officials easily distracts us from their official actions. The public has great curiosity about these private matters, and the media has financial incentives to satisfy that curiosity. The public and the press each push along these tendencies in the other, but the fundamental element here is an aspect of human nature, the weakness for voyeurism that we all have, a weakness that drives out (or at least diminishes) public attention to official actions and policies when offered more prurient alternatives. It is no accident—and only slightly hyperbolic to point out—that while the media were endlessly reporting and re-reporting details about Representative Gary Condit’s sex life, they barely noted the Rudman-Hart Commission’s Report on Terrorism and offered virtually no criticism of our ineffectual antiterrorism policies or our utter unpreparedness for terrorist attacks. Enhanced media prerogatives do not necessarily mean improvement in public discourse or enhance-

¹¹⁸ See Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet, *Constitutional Law* 1075 (4th ed 2001).

¹¹⁹ Litigation of a privacy claim, of course, presents a similar problem. See Harry J. Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 L. & Contemp. Probs. 326, 328 (1966). However, establishing a privacy right would presumably deter publication to some extent.

ment of the press' role in society. To the contrary, augmented leeway to publicize private matters almost surely means less coverage of more public matters and a diminishment of political discourse. What may be even worse, it can transform what we consider to be "public and political discourse"—with private matters coming to play a comparatively greater role both in what passes for "public and political discourse" and also in the ultimate public judgments of public figures. At times, enhanced media prerogatives not only can damage the competing value of privacy, but can distort public debate itself. Strengthening privacy protection will help reclaim both the "private" and the "public."¹²⁰

For all these reasons, then, the Court should be more receptive to rules that protect privacy even when the media's desire to publish certain truthful information is restricted. The Supreme Court has allowed the speech/privacy balance to shift too far against privacy interests. And the problem is not only the rules the Court has adopted and the Court's repeated "refusal to answer whether truthful information may ever be punished consistent with the First Amendment."¹²¹ The problem includes the fact that, in virtually every case that the Supreme Court decides involving a press/privacy conflict, the privacy claim loses. The Court sends signals by its patterns, not only by its rules.

What privacy protections will be, of course, is initially in the hands of state and federal lawmakers, and there have long been different views about the appropriate scope of privacy protection "simply" as a matter of statutory or common law.¹²² It is clear, however, that for some time statutory and common law tort rules have developed in the shadow of perceived First Amendment re-

¹²⁰ Cf. Lee Bollinger, *Images of a Free Press* 133–45 (1991) (arguing that members of a democratic society, aware of their own "deficiencies," may use public regulation to improve "the quality of public discussion"); Geoffrey R. Stone, *Imagining a Free Press*, 90 Mich L Rev 1246, 1262–63 (1992) (arguing for "some limit" on what the press reports about political candidates, "designed not only to respect [their] legitimate privacy interests . . . , but also to reflect our right, as a society, to decide that some matters simply should not play a significant role in our political process" because "the information has a greater potential to distract and distort than to inform our better judgment"); Rosen, *The Unwanted Gaze* at 143 (cited in note 93) ("knowing everything about someone's private life inevitably distracts us from making reliable judgments about his or her character and public achievements").

¹²¹ 121 S Ct at 1764, and text accompany notes 57–59.

¹²² See, e.g., Marc A. Franklin and Robert L. Rabin, *Tort Law and Alternatives: Cases and Materials* 1098–1215 (2001); Turkington and Allen, *Privacy Law* (cited in note 93).

strictions resulting from Supreme Court decisions. The Restatement (Second) of Torts is explicit that its “model” privacy tort rules take the shape they do because of the drafters’ efforts to fit those rules within the constraints of existing First Amendment doctrine.¹²³ If the Court placed fewer First Amendment restrictions on state and federal flexibility to strengthen privacy protections, not only would statutes like Title III have wider force in protecting privacy, but other federal and state protections of privacy could well expand.

In my judgment, where information has been obtained *unlawfully*, and the law prohibits further disclosures, the First Amendment should not be interpreted to stand in the way of damage actions for media disclosures, except where there is an extraordinary justification for the publication. Justice Breyer may be right that the situation in *Bartnicki* presented the kind of public security threat that counts as an extraordinary justification. If so, however, it is important to be clear that, generally speaking, the publication of unlawfully intercepted conversations, even conversations about matters being publicly debated, is not protected by the First Amendment. Even when they have a public content, they come from a private zone that the state may protect from media intrusion. Although Justice Breyer emphasizes that *Bartnicki* involves an “unusual” public concern, and that he would “not create a ‘public interest’ exception that swallows up the statutes’ privacy protecting general rule,” his examples of information that the government may protect from disclosure are all from a polar extreme—“situations where the media publicizes *truly private matters*,”¹²⁴ by which he appears to mean “truly private” content (his examples concern sexual relations and divorce). Where information has been secured unlawfully, however, and a private zone has been unlawfully invaded, privacy law should be permitted to limit the media more substantially, restricting it from disclosing conversations from that zone which concern public issues as well as personal matters.

Where information is obtained *lawfully*, but the law seeks to prevent publicity and protect privacy, the First Amendment analysis is rightly more complex. The goal is to strike a balance that pro-

¹²³ Restatement (Second) of Torts, § 652D (1977) (“Special Note on Relation of § 652D to the First Amendment of the Constitution”).

¹²⁴ 121 S Ct at 1768 (Breyer concurring) (emphasis added).

protects privacy but does not unduly restrict the press. A variety of factors should be relevant, similar to those identified in Justice Breyer's *Bartnicki* opinion.¹²⁵ One element of the analysis is the substantiality of the public concerns—put another way, the substantiality of free press concerns in light of the purposes of the First Amendment. This turns in part on the identity of the figure receiving public attention. A fuller range of a public figure's life is properly a subject of public scrutiny, and the media must have a wider "breathing space" in its coverage of such figures in order effectively to contribute to political deliberation and democratic self-governance. The nature of the information involved is also relevant. Information about "truly private matters," even concerning public figures, should generally be protectable. A second element of the analysis is the interrelated question of the extent and degree of the privacy invasion. This turns in part on content, whether intimate private characteristics or behavior is concerned. It also turns on the circumstances involved, whether the information comes from a zone of reasonably expected privacy.¹²⁶ Final elements in the constitutional analysis concern what might be called the "need" for the particular restriction involved. Are there reasonable and practical alternatives to restricting publication that would protect privacy? Does the law operate with undue selectivity, suggesting either a censorial motive concerning certain ideas or singling out of particular media unrelated to the privacy-protection rationale?

This approach would recalibrate the press/privacy balance and lead to different outcomes in some familiar cases. One example is

¹²⁵ See text accompanying note 67.

¹²⁶ As an element of the tort of "Publicity Given to Private Life," § 652D of the Restatement (Second) of Torts requires that the disclosure of a private fact be "highly offensive." See note 86. This is an incomplete measure. Even where a disclosure about intimate details of someone's life is not "highly offensive," protection may be justified. Consider a touching and tasteful story and photograph about a terminally ill teenager, published without his family's consent, or simply the publishing of ordinary personal details about a child. These may not be "highly offensive," but that should not end the inquiry. See also Rosen, *The Unwanted Gaze* at 50 (cited in note 93) ("In an age that is beyond embarrassment, it's rarely clear what a 'reasonable person' would find highly offensive.").

The Restatement also states that the tort cannot be established if the matter publicized is of "legitimate concern to the public." The word "legitimate" is in effect a placeholder, for it operates here essentially as a conclusion that the public concern is appropriate—a judgment that, as I indicate in the text, reflects a range of factors and normative trade-offs, including not only the substantiality of the public concern but also the degree to which privacy is invaded.

*Florida Star v B.J.F.*¹²⁷ A Florida statute made it unlawful to “print, publish, or broadcast . . . in any instrument of mass communication” the name of a victim of a sexual offense. The *Florida Star* violated the statute and its own internal policy of not publishing such names, and was sued by a rape victim for damages. The Court held that the First Amendment barred recovery, emphasizing that the information was “truthful” and “lawfully obtained.” But why should that count for almost everything? Publicizing a rape victim’s name is a cruel invasion of privacy concerning a matter of great sensitivity to the victim. Furthermore, in most cases, why is the name of a rape victim a matter of legitimate public concern? The fact of the rape or even the name of the alleged perpetrator is one thing, but the victim’s name is ordinarily not something the public profits from knowing. If the rape victim is a public figure or limited public figure, it is only because she has been dragged into the public square against her will as a victim of crime. It is hard to see that publicizing her name contributes to the crucial role the press plays in promoting democratic self-governance. The balance in these circumstances seems very much on the side of privacy. In addition, the Florida law in question was clear and specific. It is hard to see how enforcing this law would “chill” any valuable reporting.

The Court, invoking the *Daily Mail* test requiring the state to show a “need of the highest order” to justify limiting publication of lawfully acquired and truthful information, points to two main factors to explain its holding. First, the *Florida Star* obtained the rape victim’s name from a police incident report that had inadvertently included her name. Although the Sheriff Department could in theory have prevented the name from becoming public, the department’s error cannot be seen as evidence that the state lacked a commitment to protecting rape victims’ privacy. The privacy interests belonged to the victim. An error by the Sheriff’s Department should not put her at the mercy of the newspaper, which knew full well that it had a legal obligation not to disclose the victim’s name and itself had an internal policy against doing so. Protecting privacy should not be a game of gotcha. Second, the Court said that the Florida statute was underinclusive in that it

¹²⁷ 491 US 524 (1989).

prohibited publication only by “an instrument of mass communication,” not by other means. But since Florida’s primary concern was to prevent the widespread dissemination of rape victims’ names, the statute’s focus is understandable. This is not a case where the state has singled out one segment of the news media for adverse treatment in a manner suggesting that there are favored and disfavored media entities. It is hard to see how the interest in press freedom and free expression is harmed by this “underinclusiveness.”

The flavor of the Court’s opinion in *Florida Star* is that the Court will find any conceivable escape hatch for media liability. The Court gives only token recognition to the value of implementing legal protections of privacy. This extreme solicitude for the one and sharply limited solicitude for the other is what should be reversed.

Florida Star involved a private figure victimized by crime. Unfortunately, other types of “involuntary public figures” also receive too little privacy protection under current law. The official comments to Section 652D of the Restatement (Second) of Torts (“Publicity Given to Private Life”),¹²⁸ clearly influenced by existing First Amendment law, state:

There are other individuals who have not sought publicity or consented to it, but through their own conduct or otherwise have become a legitimate subject of public interest. They have, in other words, become “news.” . . . These persons are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public As in the case of the voluntary public figure, the authorized publicity is not limited to the event that itself arouses the public interest, and to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely private. (Comment f.)

I would not interpret the First Amendment to prohibit protections against disclosures of “purely private” and tangential matters. Consider the case of Oliver Sipple, who, while standing in a crowd of onlookers, blocked Sara Jane Moore’s arm as she was about to shoot at President Gerald Ford. The *San Francisco Chronicle* thereafter disclosed that Sipple was gay. When Sipple sued the newspa-

¹²⁸ See note 86.

per for invasion of privacy, his case was dismissed on First Amendment grounds. The California appellate court noted that Sipple had not completely concealed his sexual identity (although the court did not dispute that Sipple had kept the information from his family and that, as a result of the publicity, Sipple's family abandoned him). But the court's main argument was that "the publications were not motivated by a morbid and sensational prying into appellant's private life but rather were prompted by legitimate political considerations, i.e., to dispel the false public opinion that gays were timid, weak and unheroic figures. . . ." ¹²⁹ Given the intensely personal nature of Sipple's sexual identity and the care many homosexuals take to limit general knowledge about that identity, and given that Sipple did not seek notoriety, this asserted connection between the private fact and "political considerations" was simply too weak to warrant the *Chronicle's* disclosure. ¹³⁰

The privacy protections permitted to a true public figure—a political official, an entertainment personality—must be more limited. Most obviously, the media must have a very broad right to cover the actions of political figures because of the presumptive connection between such coverage and the process of democratic self-governance and because the media must be given "breathing space . . . to ensure the robust debate of public issues." ¹³¹ Voters assess public officials on a wide variety of grounds, and the scope of press coverage properly reflects this. But this rationale should not make every aspect of a public figure's life fair game for media attention.

Public officials have some legitimate expectations of privacy because they are human beings as well as "public officials." They magnify and reconfigure, but do not abandon, our own complex and ambivalent relations to the public as we assume multiple roles in day-to-day life. Indeed, since public figures are typically our

¹²⁹ *Sipple v Chronicle Publishing Co.*, 201 Cal Rptr 665, 670 (Cal App 1st 1984).

¹³⁰ For a different view, see Rosen, *The Unwanted Gaze* at 48 (cited in note 93). Rosen describes "the brutal outing of Oliver Sipple" and recognizes the "psychological distress" it caused (Sipple eventually committed suicide), but concludes: "[D]espite the tragic personal consequences that often result from the disclosure of true but embarrassing private facts, it's appropriate, in a country that takes the First Amendment seriously, that invasion of privacy suits against the press rarely succeed."

¹³¹ *Dun and Bradstreet, Inc. v Greenmoss Builders*, 472 US 749, 776 (1985); *New York Times Co. v Sullivan*, 376 US at 271–72.

proxies and representatives in the public space and perform so many public functions for us—letting us preserve more of the private than we otherwise could—we arguably owe them space for at least some reciprocal measure of our own ambivalence and our own needs for privacy. When Justice Stevens says in *Bartnicki* that “[o]ne of the costs of participation in public affairs is an attendant loss of privacy,”¹³² he is making a descriptively true statement. But he seems to be using this inevitable descriptive truth as a justification for allowing the law itself to undermine privacies that can be preserved. Some people, of course, will enter public life even if they know that their lives will be lived on the front pages of newspapers; and there always will be some public figures complicitous in destroying their own potential privacy. Nevertheless, our legal regime should not compel those interested in public affairs to pay such a price against their will.

Reporting on sexual habits or on intimate family matters of public figures should generally be outside First Amendment protection, particularly when the information comes from circumstances of reasonably expected privacy. To be sure, media disclosures concerning these private matters can always be said to promote the greater accountability of public officials because there will always be some citizens who view those private matters as relevant to the official’s suitability for office.¹³³ But that, by itself, cannot justify First Amendment protection for such disclosures. Accountability in this expansive sense should not trump all other values. It is a very important value, but not our democratic society’s only value. If public figures should have some zone of protected privacy, then some limits on the media’s leeway to invade privacy will have to be accepted, even if this also means some limit on accountability. I am prepared to accept this, although many will disagree and al-

¹³² 121 S Ct at 1765.

¹³³ See Post, *The Social Foundations of Privacy* at 74–85 (cited in note 52); Geoffrey R. Stone, 90 Mich L Rev at 1262–63 (cited in note 120); Owen M. Fiss, *Do Public Officials Have a Right to Privacy?* in Dieter Simon and Manfred Weiss, eds, *Zur Autonomie des Individuums: Liber Amicorum Spiros Simitis* 91–98 (2001). For example, Professor Post writes: “The claims of public officials to a ‘private’ information preserve are simply overridden by the more general demands of the public for political accountability. . . . Because American law views the public, in its role as the electorate, as ultimately responsible for political decisions, the public is presumptively entitled to all information that is necessary for informed governance.” Id at 76, 78.

though I recognize, and would seek to minimize, the risks of chilling more legitimate press coverage. The law already recognizes some of these limits on the media. As Justice Stevens himself notes in *Bartnicki*, we forbid reporters from stealing documents and from wiretapping, even if these activities would provide newsworthy information.¹³⁴ A prohibition on publishing certain lawfully obtained information involves different concerns, of course. But where a democratically elected legislature seeks to give limited additional protection to the privacy of public officials, neither First Amendment principles nor a commitment to democratic self-government should necessarily bar this.

Indeed, as I argued above, information about the private lives of public officials so readily distracts us from their official actions that limiting press coverage of these private matters would likely enhance public discourse and public debate that is at the heart of the First Amendment's purposes. Such limitations could also strengthen the process of democratic self-government in other respects. In the name of improving the quality of official actions by enhancing public scrutiny, media coverage that intrudes on private matters can distort the personalities of public officials and damage their performance. In addition, it is widely believed that many talented people are being deterred from running for office or assuming senior political appointments because of a concern about the extreme loss of privacy that now must be expected for oneself and one's family. If there were greater protections for privacy, the political system as a whole could be strengthened by drawing greater numbers of talented people into public service.¹³⁵ As Justice Breyer has argued in a recent speech,¹³⁶ we should see the Constitution as a whole and read the First Amendment as a part of that whole—a document seeking to advance a system of effective democratic self-governance. Certain media restrictions to protect privacy, even though limiting the press' leeway, may in overall effect contribute positively to advancing public debate and democratic self-governance.

¹³⁴ 121 S Ct at 1764 n 19. See also *Wilson v Layne*, 526 US 603 (1999) (Fourth Amendment violated by media "ride-along" to accompany police during attempted execution of arrest warrant in a person's home).

¹³⁵ See, e.g., Fiss, *Do Public Officials Have a Right to Privacy?* at 94 (cited in note 133).

¹³⁶ Breyer, *Our Democratic Constitution* (cited in note 89).

There are too many special circumstances related to President Clinton's relationship with Monica Lewinsky to make that a prime example here (the presidency is arguably a special case; the information about President Clinton's relationship with Monica Lewinsky developed out of the Paula Jones legal proceeding and then became relevant to a possible perjury prosecution and impeachment, raising distinctive questions regarding the proper scope of discovery, sexual harassment law, and "high crimes and misdemeanors"; and adulterous sexual relationships had already become an issue in President Clinton's political campaigns and in political judgments about him). But whatever one thinks about that episode (I consider it to have been a distraction from the public's business), I would not interpret the First Amendment as categorically barring efforts to prevent media disclosures about the private sexual behavior of public officials. Nor should it bar restrictions on the publication of other intimate personal matters, such as information about their children or private photographs. Once again, relevance to matters of public concern could undoubtedly be drawn in most cases—sexual behavior may suggest something about a person's character or general willingness to take risks, family details may reveal something relevant to the public policies the official has articulated, etc. At times the relevance to public matters may indeed be substantial, and therefore publication addresses a legitimate public concern. But if we allow any articulated relevance to a public concern to justify publication, however weak that relevance is, we have eliminated privacy protection for public figures, and that is too extreme.¹³⁷

The constitutional law of other countries reinforces the reasonableness of the approach suggested here, or at least makes clear that our own Supreme Court's approach has judicial competitors. Other countries often take a significantly more privacy-protective and media-restrictive approach than we do. These countries, of

¹³⁷ "Public figures" from the entertainment world present somewhat different issues because such figures are typically less connected than public officials to the process of public deliberation and democratic self-government. Matters of public significance that might justify media publicity may therefore be less clearly involved. On the other hand, entertainment figures often utilize publicity about their private lives (including their sexual partners) to enhance their public image, so the interest in the privacy of personal facts may sometimes be less apparent. Nevertheless, in my judgment, there should still be protectable zones of privacy that the media may not invade—for example, publishing intrusively (if lawfully) secured photographs of entertainment figures with their children.

course, have somewhat different constitutional provisions, and I do not suggest that comparisons can be made in any simple fashion. But a few examples will illustrate that our Court has struck the speech/privacy balance quite differently from many other democratic countries with highly developed constitutional systems and a vibrant free press.

In Great Britain, for example, a well-known case quite analogous to *Bartnicki* was decided against the media, with more weight given to the fact that the published material had been unlawfully obtained. In *Francome v Mirror Group Newspapers Ltd.*,¹³⁸ an unknown person illegally bugged telephone conversations made to and from the home of a champion jockey—a criminal offense under British law. The *Daily Mirror*, a newspaper that had nothing to do with the bugging, obtained tapes of the telephone conversations and wanted to publish material based on them. Publication, the *Daily Mirror* said, was justified because the tapes revealed actions contrary to the public interest and possible criminal conduct by the jockey. The jockey sought to enjoin the *Daily Mirror's* publication of the material. The Court of Appeal upheld the trial judge's granting of an injunction pending full trial. Sir John Donaldson wrote, "I regard [the *Daily Mirror's*] assertion as arrogant and wholly unacceptable. . . . If . . . the *Daily Mirror* can assert this right to act on the basis that the public interest, as [it] sees it, justifies breaches of the criminal law, so can any other citizen."¹³⁹

The Supreme Court of Germany and the German Constitutional Court, the most influential constitutional court in Europe, have developed a rich speech/privacy jurisprudence that is very different from ours conceptually, and that yields quite different results in particular cases, including one quite similar to *Bartnicki*. What we in the United States call the right to privacy is protected in Germany by the constitutional right to "the free development

¹³⁸ 2 All ER 408 (CA 1984).

¹³⁹ Sir John Donaldson added: "The media . . . are an essential foundation of any democracy. In exposing crime, anti-social behavior and hypocrisy and in campaigning for reform and propagating the views of minorities, they perform an invaluable function. However, they are peculiarly vulnerable to the error of confusing the public interest with their own interest. . . . In the present case, pending a trial, it is impossible to see what public interest would be served by publishing the contents of the tapes which would not equally be served by giving them to the police or to the Jockey Club. Any wider publication could only serve the interests of the *Daily Mirror*." Id at 413.

of one's personality"¹⁴⁰ in conjunction with the right to "human dignity."¹⁴¹ The personality right "comprises the authority of the individual to decide for himself—based on the idea of self-determination—when and within what limits facts about one's personal life should be disclosed."¹⁴² The right is conceptualized as a right to "informational self-determination."¹⁴³ The individual, however, "has to accept limitations on his right to informational self-determination for reasons of a predominant public interest." "In formulating enactments," the Constitutional Court has said, the legislature "has to observe the principle of proportionality"¹⁴⁴—"proportionality" being the widely invoked concept of balancing in many constitutional courts and supreme courts around the world.¹⁴⁵

The German courts have decided several cases addressing the balance between the right to "informational self-determination" and "freedom of the press." The courts' analysis, of course, depends upon a constitutional context quite different from ours: the privacy right is expressly protected by the German Constitution and applies to relationships among citizens, not simply between the citizen and the state. But the comparison is instructive. The *Bartnicki*-type case involved a suit against the magazine *Stern* for publishing the transcript of an illegally taped telephone call between two senior political party officials about political matters in Germany.¹⁴⁶ *Stern* knew that the information had been obtained unlawfully but had not participated in the intrusion. The German Supreme Court concluded that the plaintiffs' "personality" right was violated and that the defendant's "free press" right was not.

¹⁴⁰ Grundgesetz (Basic Law), Art 2. The English translations of the German materials discussed here are taken from Paul Gewirtz and Jacob Katz Cogan, *Global Constitutionalism: Privacy, Proportionality, The Political Case* (2001) (hereafter cited as *Global Constitutionalism*). Grundgesetz (Basic Law), Art 2, appears in *Global Constitutionalism* at II-27.

¹⁴¹ Grundgesetz (Basic Law), Art 1, in *Global Constitutionalism* at II-27.

¹⁴² *Census Act Case*, BVerfGE, 1 (1983), in *Global Constitutionalism* at I-3.

¹⁴³ *Id.* at I-4. The right is understood as not only contributing to an individual's personal development but as also contributing to "the common good" because informational self-determination fosters important elements of a "free democratic community" such as "communication" and "participation." *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See Part IV (discussing proportionality).

¹⁴⁶ *On the Limits Placed on the Press by the Personality Right*, BGHZ 73, 120 (1978), in *Global Constitutionalism* at II-25.

“[B]alancing the conflicting interests,”¹⁴⁷ the Court concluded that “[o]nly a very grave public need to be informed could possibly justify” publishing the transcript of the phone call, which exposed the “personal sphere . . . in an unusually intrusive form.”¹⁴⁸ That “grave public need” did not exist in this case, even though public officials were involved and the conversation concerned their public functions.

In another important decision, the German Constitutional Court ruled that Princess Caroline of Monaco’s “personality” rights were violated by magazines that published photographs of her and her boyfriend in a garden cafe which had “the characteristics of . . . a sphere of seclusion” even though members of the public were present, as well as photographs of Princess Caroline with her children on a street and in a canoe.¹⁴⁹ The publication of other photographs showing Princess Caroline in “the public sphere” was held not to violate her personality rights.

In a well-known Indian speech/privacy case, the Supreme Court of India stated that “[t]he sweep of the First Amendment to the United States Constitution and the freedom of speech and expression under our Constitution is not identical though similar in their major premises.”¹⁵⁰ Among these differences, the Indian Court concluded that a “proper balancing of the freedom of press” and the “right to privacy” means that “the victim of a sexual assault, kidnap, abduction or alike offense should not further be subjected to the indignity of her name and the incident being publicised in press/media.”¹⁵¹

Lastly, the Supreme Court of Canada, which is generally strongly press-protective, has upheld a damages action for the un-

¹⁴⁷ Id at II-30. As a general matter, the Court observed, “[t]he more the information is private in character and the more it involves personal interests in keeping it secret and the more it involves personal harm, the greater the ‘public value’ will have to be if the press wants to disregard the person’s wish in keeping it [private].” Id at II-31. Note the similarity to Justice Breyer’s balancing approach in *Bartnicki* and his conclusion there that “the speakers’ legitimate privacy expectations are unusually low, and the public interest in defeating those expectations unusually high.” 121 S Ct at 1768.

¹⁴⁸ *Global Constitutionalism* at II-27. The Court, in a crucial conceptualization, observed that the taped conversation “addressed very *personal* concerns, even though these were still related to their *public* occupations.” Id at II-26 (emphasis added).

¹⁴⁹ *Princess Caroline of Monaco Case*, BVerfGE 101, 361 (1999), in *Global Constitutionalism* at II-33.

¹⁵⁰ See *Rajagopal v State of Tamil Nadu*, 6 S C C 632, 648 (1994).

¹⁵¹ Id at 648, 650.

authorized publication of a photograph that a magazine photographer had taken of the plaintiff in a public place and published without that person's consent.¹⁵² In doing so, the Canadian Court specifically disagreed with American constitutional law. The Court held that "the right to one's image is included in the right to respect for one's private life" protected by the Quebec Charter, that the "freedom of expression" was also involved here, and that it was necessary "to balance these two rights."¹⁵³ The Supreme Court of Canada rejected the approach of the Court of Appeal that "the public's right to information will prevail where the expression at issue concerns information that is 'socially useful.'"¹⁵⁴ The Court stated:

This notion seems to have been borrowed from American law A photograph of a single person can be "socially useful" because it serves to illustrate a theme. That does not make its publication acceptable, however, if it infringes the right to privacy. We do not consider it appropriate to adopt the notion of "socially useful" for the purposes of legal analysis. . . . Only one question arises, namely the balancing of the rights at issue. It must, therefore, be decided whether the public's right to information can justify dissemination of a photograph taken without authorization. . . . In our view, the artistic expression of the photograph, which was alleged to have served to illustrate contemporary urban life, cannot justify the infringement of the right to privacy it entails. It has not been shown that the public's interest in seeing this work is predominant. . . . [F]reedom of expression must be defined in light of the other values concerned.¹⁵⁵

No other democratic country forbids restrictions on expressive conduct as completely as the United States. Supreme courts and constitutional courts in most other democracies give greater weight to values of privacy and human dignity when they conflict with free speech claims, and they therefore are more inclined to permit legal actions against privacy invasions, libel, and hate speech. They also permit the state to play a much greater role in assuring wider public access to the media even though some restriction on the speech of others is involved. Although the consti-

¹⁵² *Aubry v Editions Vice-Versa Inc.*, 1 S C R 591 (1998).

¹⁵³ *Id* at 615, 616.

¹⁵⁴ *Id* at 617.

¹⁵⁵ *Id* at 617-18.

tutional rules in these countries are somewhat different, the press is vibrant and robust. The glories of the American free speech tradition have had great and greatly beneficial influence worldwide. But to other countries, our current free speech doctrines seem to have become quite extreme, and our current law indeed is at the far end of the spectrum. Thus, far from being aberrational, giving more weight to privacy in speech/privacy cases would move American free speech law closer to the global democratic mainstream.

IV

Justice Breyer's concurring opinion in *Bartnicki*, while directly relevant for its treatment of the speech/privacy tension, deserves further comment because of its wider implications for First Amendment analysis generally. Many of Justice Breyer's key moves in *Bartnicki*—his conceptualization of speech on both sides of the constitutional analysis, his receptivity to some restrictions on speech where doing so would produce important “privacy and speech-related benefits,” his utilization of flexible proportionality analysis—are part and parcel of an important new approach to First Amendment analysis that Justice Breyer has been developing in various separate opinions over the last several years.¹⁵⁶ He has recently developed these views further in his ambitious Madison Lecture,¹⁵⁷ placing his First Amendment views in the context of a wider constitutional theory that emphasizes “participatory self-governance” as a central theme in constitutional law generally.

Breyer's First Amendment approach has several key elements:

1) The First Amendment's protection of “the freedom of speech” seeks not only to prevent government restrictions on speech, but also to “enhanc[e]” speech,”¹⁵⁸ “to facilitate . . . public discussion and informed deliberation,”¹⁵⁹ and to help advance “the

¹⁵⁶ See *Turner Broadcasting System, Inc. v Federal Communications Commission*, 520 US 180, 225–29 (1997) (Breyer concurring in part); *Nixon v Shrink Missouri Government PAC*, 528 US 377, 399–405 (2000) (Breyer concurring); *United States v Playboy Entertainment Group, Inc.*, 529 US 803, 835–47 (2000) (Breyer dissenting); *Bartnicki v Vopper*, 121 S Ct 1753, 1766 (2001) (Breyer concurring); *United States v United Foods, Inc.*, 533 US 405, 450–59 (2001) (Breyer dissenting).

¹⁵⁷ Breyer, *Our Democratic Constitution* (cited in note 89).

¹⁵⁸ *Bartnicki v Vopper*, 121 S Ct at 1766.

¹⁵⁹ *Turner Broadcasting System, Inc. v Federal Communications Commission*, 520 US at 227.

Constitution's general participatory self-government objective."¹⁶⁰ In others words, the freedom of speech is not only a negative liberty but also an "active liberty,"¹⁶¹ concerned with "encouraging the exchange of ideas,"¹⁶² "encouraging . . . public participation and open discussion,"¹⁶³ "assuring that the public has access to a multiplicity of information sources,"¹⁶⁴ "facilitat[ing] . . . informed deliberation,"¹⁶⁵ and "prevent[ing]" the speech of "a few from drowning out the many."¹⁶⁶

2) Current First Amendment cases tend to see the restriction of speech as the only free speech interest in the picture. However, many challenged laws enhance the speech of some people while restricting the speech of others. The "speech-enhancing"¹⁶⁷ dimensions of such laws promote First Amendment interests even though other aspects of these laws restrict First Amendment interests. Thus, in one of Breyer's central ideas, reiterated in *Bartnicki*, "[C]onstitutionally protected interests lie on both sides of the legal equation."¹⁶⁸

3) Once one accepts that "constitutionally protected interests lie on both sides of the legal equation," conventional First Amendment doctrine becomes less useful and less appropriate. Under the conventional doctrines, laws that directly restrict speech typically trigger "strict scrutiny"—a strong presumption against a law's constitutionality, which almost always condemns the law to invalidation. But where laws have speech-enhancing elements as well as speech-restricting ones, Justice Breyer says, the proper constitutional analysis must involve balancing of these interests. The key question should be one of "proportionality"—whether the "laws impose restrictions on speech that are disproportionate

¹⁶⁰ Breyer, *Our Democratic Constitution* at 6 (cited in note 89).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Nixon v Shrink Missouri Government PAC*, 528 US at 401.

¹⁶⁴ *Turner Broadcasting System, Inc. v Federal Communications Commission*, 520 US at 227 (citation omitted).

¹⁶⁵ *Id.*

¹⁶⁶ *Nixon v Shrink Missouri Government PAC*, 528 US at 402.

¹⁶⁷ *Bartnicki v Vopper*, 121 S Ct at 1766.

¹⁶⁸ *Id.* at 400.

when measured against their corresponding . . . speech-related benefits.”¹⁶⁹

4) Because the First Amendment seeks to advance “the Constitution’s general participatory self-government objective” and not simply to “protect[] the individual’s ‘negative’ freedom from governmental restraint,”¹⁷⁰ First Amendment doctrine must “distinguish among areas, contexts, and forms of speech.”¹⁷¹ Nearly every human action involves speech, and strict scrutiny is inappropriate in evaluating restrictions on commercial speech, government speech, or the speech of government employees. If the First Amendment is interpreted more expansively, it would impose “a serious obstacle to the operation of well-established, legislatively created, regulatory programs, thereby seriously hindering the operation of that democratic self-government that the Constitution seeks to create and to protect.”¹⁷²

Using these new building blocks of First Amendment analysis, Justice Breyer’s separate opinions over the past few years take a more tolerant approach to laws limiting the speech of some in order to enhance the overall system of free expression.¹⁷³ He has shown greater tolerance for campaign finance laws that limit campaign contributions and spending so that the speech of “a few” does not “drown[] out the many.”¹⁷⁴ He has embraced a more tolerant approach to telecommunications laws that open communications pathways such as cable to more diverse voices, even though the speech interests of the cable owners are somewhat restricted.¹⁷⁵ And, in *Bartnicki*, he showed a more tolerant approach to legislation that restricts the media in order to promote the privacy of communications and thereby “foster[] private speech.”

¹⁶⁹ 121 S Ct at 1766.

¹⁷⁰ Id.

¹⁷¹ Breyer, *Our Democratic Constitution* at 10 (cited in note 89).

¹⁷² *United States v United Foods, Inc.*, 121 S Ct at 2346 (2001).

¹⁷³ As Jeffrey Rosen has noted in a recent article, Justice Breyer “is certainly the first Supreme Court justice to embrace this view of the First Amendment wholeheartedly, and to apply it consistently across a variety of cases.” Jeffrey Rosen, *Modest Proposal: Stephen Breyer Restrains Himself*, *The New Republic* (Jan 14, 2002), 21, 24. Academic writing that has explored somewhat similar ideas in recent years include Fiss, *Liberalism Divided* (cited in note 96); Fiss, *The Irony of Free Speech* (cited in note 96); Sunstein, *Democracy and the Problem of Free Speech* (cited in note 111); and Post, *Constitutional Domains* (cited in note 52).

¹⁷⁴ *Nixon v Shrink Missouri Government PAC*, 528 US at 400.

¹⁷⁵ *Turner Broadcasting System, Inc. v Federal Communications Commission*, 520 US at 225.

Justice Breyer also seems willing to look at the constitutional equation in speech cases with greater receptivity for values on the “other side” that are not themselves “speech-enhancing.” In *Bartnicki*, Breyer balanced the speech restrictions of the challenged law against both the “privacy and speech-related benefits” of the law,¹⁷⁶ not just the speech-related ones. In another First Amendment decision last term, Justice Breyer would have allowed the government to burden commercial speech in order to further rather ordinary economic regulation.¹⁷⁷ And in a case decided the prior year, Breyer wrote a dissenting opinion stating that he would uphold a statutory limit on the programming leeway of cable operators where the value on the “other side” was protecting children from indecent programming.¹⁷⁸

These decisions represent an important new approach to the First Amendment on the Supreme Court. Breyer’s core substantive idea is that in our constitutional system of participatory self-government, the First Amendment’s role is not simply to protect individuals from direct government restraints on speech. “Freedom of speech” means a system of free expression that provides speakers wide opportunities for public and private expression, provides listeners diverse sources of information, encourages meaningful interactions between speakers and listeners, and fosters greater public participation. This sometimes requires restrictions on speech, but these can be justifiable where they enhance the overall system of free expression.

Breyer’s opinions also indicate that he would modestly recalibrate the balance between speech and other interests to take account of contemporary threats to free speech as well as to other social interests. He clearly believes that current First Amendment law has tilted somewhat too decisively in the direction of protecting speech interests and does not give enough weight in certain contexts to other important interests such as privacy, human dignity, protecting children, and equality. Suggesting modifications in our free speech law undoubtedly causes concern in some quarters. But to preserve free speech, Justice Breyer suggests, the Court

¹⁷⁶ 121 S Ct at 1766–67.

¹⁷⁷ *United States v United Foods, Inc.*, 121 S Ct at 2346.

¹⁷⁸ *United States v Playboy Entertainment Group, Inc.*, 529 US at 835.

must be attentive to serious new threats that imperil free speech; and where there are serious new threats to other values, and laws can address them without significantly weakening free speech, the Constitution should not be interpreted to stand in the way.

Breyer's conception of constitutional rights as protecting "active liberty" has another interrelated effect—one with potentially general implications for constitutional law. Under conventional constitutional analysis, burdens on speech or privacy imposed by nongovernmental entities do not violate the First Amendment because of the state action doctrine. Therefore, in a case like *Bartnicki*, Title III's governmental interference with the media would come under First Amendment scrutiny, but the private broadcaster's interference with speech by publishing illegally intercepted conversations does not. Conceptualizing freedom of speech as an "active liberty," however, enables Justice Breyer to characterize the interests on both sides of the dispute as "constitutional interests." I do not understand Breyer to be saying that there is an independently enforceable constitutional right of free speech against nongovernmental interference, or to be saying that the state has a judicially enforceable constitutional obligation to protect speech from private interference (at least not yet). But his view does lead to a different understanding of the permissible roles of the state. In understanding free speech as an "active liberty," and the First Amendment as having positive goals of fostering an overall system of free expression, Justice Breyer sees state action that protects speech from private interference as furthering the same democracy-enhancing objective as the First Amendment and thereby furthering a "constitutional interest."¹⁷⁹ This allows him to give the privacy side of the equation in *Bartnicki* heightened stature (and greater weight) in the constitutional analysis, and in other contexts to uphold state actions that "strike a reasonable balance between their . . . speech-restricting and speech-enhancing consequences."¹⁸⁰

The basic questions raised are not only whether this recalibrated balance is called for but also whether courts can be trusted to im-

¹⁷⁹ Breyer, *Our Democratic Constitution* at 6–7 (cited in note 89).

¹⁸⁰ *Id.* at 7.

plement it. Justice Breyer's analysis requires judges to determine not only whether the government has imposed a substantial burden on someone's speech, but whether the overall balance of speech-restricting and speech-enhancing benefits of a law is reasonable. In at least some areas, such as laws governing election campaigns, this invites courts to assess the overall fairness and balance of public debate—is the voice of a few “drowning out the voice of the many”?—and creates a risk that courts will consciously or unconsciously favor certain points of view in making their assessment. But the question is which risk is greater: the risks of an unregulated speech market (which risks a bias in favor of certain interests and viewpoints) or the risks of some regulatory efforts to foster more open and balanced debate (which risks smuggling in certain biases in the drafting of such legislation and in the judicial assessment of its fairness).

The balancing may be even more difficult where values other than speech are weighed against speech. In his separate opinions, Justice Breyer has indicated several values other than speech (or clear and present danger) that might justify certain restrictions on speech: protecting children from sexually explicit speech, protecting privacy (in its nonspeech dimensions), and economic regulation (where the restriction was on commercial speech). It is unclear how far Justice Breyer is prepared to go in this direction, what values are sufficiently important to justify speech restrictions, or how such balances will be made. Where speech is “on the other side of the equation,” the justification for restricting speech is the same constitutionally rooted speech value, and at least in theory there is a common metric (e.g., enhancement of diversity of viewpoints). But where nonspeech values are on the other side, the justification for restricting speech will typically not itself be a constitutional value and, in addition, there will be no common metric. For those who consider free speech to be highly vulnerable in our society, and who greatly distrust whether legislatures and judges will adequately protect it, allowing nonspeech values to trump speech values will always be a very risky business (and especially so in times of national stress). In short, questions and concerns are understandable. But based on the evidence thus far, Justice Breyer has applied his approach in a finely tuned way that is taking more open and fuller account of the complex contending interests genuinely at stake, yet also remaining strongly speech-protective.

Justice Breyer's approach is also significant in its method. His opinions reveal a growing skepticism about the complex array of doctrinal formulas that now make up First Amendment law, a concern that they invite "mechanical"¹⁸¹ applications and do not keep in view the purposes of the First Amendment or take open account of the full complexities and likely consequences of decisions or readily accommodate new social realities. Justice Breyer favors a more explicit and multifactored balancing of interests. In *Bartnicki*, for example, he rejects strict scrutiny, but does not embrace any other existing "test." Rather, he says:

I would ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences. Or do they instead impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits?¹⁸²

As the word "disproportionate" in this passage indicates, one of the most striking things about Breyer's approach is that he has begun to embrace a formulation of balancing widely used by supreme courts and constitutional courts in other leading democracies: "proportionality." "Proportionality" is a general element of constitutional analysis used by these courts in diverse areas of constitutional law,¹⁸³ but it has not in so many words entered American

¹⁸¹ *Nixon v Shrink Missouri Government PAC*, 528 US at 400; *United States v Playboy Entertainment Group, Inc.*, 529 US at 841.

¹⁸² 121 S Ct at 1766.

¹⁸³ An analysis of the concept of "proportionality" as used by other countries' supreme courts and constitutional courts is beyond the scope of this article. For a fuller discussion, see Paul Gewirtz and Jacob Katz Cogan, *Global Constitutionalism* at IV-1-98 (cited in note 140). Examples of cases from other jurisdictions discussing and applying the proportionality concept include: *Lebach Case*, BVerfGE 35, 202 (1975) (Constitutional Court of Germany); *Cannabis Case*, BVerfGE 90, 145 (1994) (Constitutional Court of Germany); *Reiten im Walde Case*, BVerfGE 80, 137 (1989) (Constitutional Court of Germany); *R. v Oakes*, 1 S C R 103 (1986) (Supreme Court of Canada); *Dagenais v CBC*, 3 S C R 835 (1994) (Supreme Court of Canada); *Thomson Newspaper v Canada* (A.G.), 1 S C R 877 (1998) (Supreme Court of Canada); *Decision Dated April 26, 1995 (K.11/94)* (Constitutional Court of Poland), in *Constitutional Tribunal, a Selection of the Polish Constitutional Tribunal's Jurisprudence from 1986 to 1999*, at 153-58 (1999); *United Mizrab Bank Ltd. v Migdal Village*, 49 (4) P D 221 (1995) (Supreme Court of Israel). See also P. van Duk and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* 80-82 (3d ed 1998); Walter van Gerven, *The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe*, in Evelyn Ellis, ed, *The Principle of Proportionality in the Laws of Europe: A Comparative Study* (1999).

constitutional law. Justice Breyer has been the boldest of the current U.S. Supreme Court Justices in drawing upon concepts and examples from the constitutional jurisprudence of other countries, including "proportionality."¹⁸⁴ His concurrence in *Nixon v Shrink Missouri Government PAC*, for example, explicitly cited "proportionality" cases from the European Court of Human Rights and the Supreme Court of Canada, with Breyer writing:

[W]here a law significantly implicates competing constitutionally protected interests in complex ways[,] the Court has closely scrutinized the statute's impact on those interests, but refrained from employing a simple test that effectively presumes unconstitutionality. Rather, it has balanced interests. And in practice that has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative). . . . [This approach] is consistent with that of other constitutional courts facing similar complex constitutional problems.¹⁸⁵

In his dissent in *United States v Playboy Entertainment Group, Inc.*, he counsels the Court "not to apply First Amendment rules mechanically, but to decide whether, in light of the benefits and potential alternatives, the statute works speech-related harm (here to adult speech) out of proportion to the benefits that the statute seeks to provide (here, child protection)."¹⁸⁶ His recent Madison

¹⁸⁴ In addition to the "proportionality" concept, Justice Breyer has referred to other countries' constitutional law in other respects. See, e.g., *Printz v United States*, 521 US 898, 976-77 (1997) (Breyer dissenting) (discussing other countries' approach to federalism); *Nixon v Shrink Missouri Government PAC*, 528 US 377, 403 (2000) (Breyer concurring) (discussing other countries' approach to campaign finance); Breyer, *Our Democratic Constitution* at 7 (cited in note 89) (referring to same); *Knight v Florida*, 528 US 990 (1999) (Breyer dissenting from denial of certiorari) (discussing other countries' treatment of delays in capital punishment executions). In speeches he has also spoken approvingly of the fact that "[j]udges who enforce the law as well as those who write it increasingly turn to the experience of other nations when deciding difficult open questions of substantive law, particularly human rights law. . . ." He notes that U.S. courts "less frequently refer to judicial opinions from abroad" than other courts do, and has called upon American lawyers and academics to "themselves become familiar with foreign material relevant to particular legal disciplines and facilitate the judicial use of that material." Stephen Breyer, Dinner Keynote Speech, International Symposium on Democracy and the Rule of Law in a Changing World Order, New York University Law School, March 9, 2000 (copy on file with author).

¹⁸⁵ 528 US at 402, 403 (citations omitted).

¹⁸⁶ 529 US at 841. Citing his own separate opinion in *Bartnicki*, Justice Breyer also invoked the idea of proportionality in last term's dissent in *United States v United Foods, Inc.*, a commercial speech case:

Several features of the program indicate that its speech-related aspects, i.e., its compelled monetary contributions, are necessary and proportionate to the legiti-

Lecture is the most direct: “The basic question the Court should ask is one of proportionality.”¹⁸⁷

It is fair to ask whether this balancing or “proportionality” review invites too much subjectivity and arbitrariness from judges. The question, of course, is not whether we trust judges like Justice Breyer to engage in this kind of balancing, but whether we trust our adjudicative system as a whole. I remain of two minds about this. Concerns about subjectivity and arbitrariness in balancing are altogether legitimate. But the system of doctrinal rules that we have now itself invites subjectivity and arbitrariness, both in deciding what rule to apply in a particular circumstance and in applying the selected rules. The variety of different doctrinal rules in contemporary First Amendment law—“strict scrutiny,” “intermediate scrutiny,” the *Daily Mail* principle, “clear and present danger,” the *New York Times Co. v. Sullivan* test, content neutrality, prior restraint, “public forum” rules, rules for commercial speech and other “low-value” speech, etc.—reflects the complexities of the balances that need to be made and continuing disagreements about the appropriate approach. As the invocation of both “intermediate scrutiny” and “the *Daily Mail* principle” in the *Bartnicki* litigation itself demonstrates, the current doctrinal cacophony creates remarkable leeway for choosing which doctrinal rule to apply as well as what result to reach. Interest balancing often occurs, but not in a fully open way.

In this rather chaotic doctrinal situation, and in circumstances of social and technological change that create new background conditions, an open recognition of the factors at stake and a more direct consideration and debate about the values in the balance have distinctive value. With more open balancing, a fuller range of factors can be made visible. Justice Breyer’s use of balancing and proportionality analysis has a refreshing candor and lucidity, and his very openness about the factors at work for him is a constraint on subjectivity.¹⁸⁸ What he says in his Madison Lecture

mate promotional goals that it seeks. . . . [At] the same time, those features of the program that led [dissenters in an earlier case] to find its program disproportionately restrictive are absent here. . . . In consequence, whatever harm the program may cause First Amendment interests is proportionate.

533 US at 457.

¹⁸⁷ Breyer, *Our Democratic Constitution* at 7 (cited in note 89).

¹⁸⁸ See Rosen, *Modest Proposal* at 25 (cited in note 173).

about his pragmatic attention to “consequences” is as applicable to his balancing approach generally: An approach that exclusively emphasizes “language, history, tradition, or prior rules,” at least in the “borderline” cases, will “produce a decision which is no less subjective but which is far less transparent than a decision that directly addresses consequences in constitutional terms.”¹⁸⁹ In addition, many of the existing rules would still have value as guidelines because they reflect and crystalize past experience about where the balance should lie. The balancing inquiry may eventually lead to new guidelines. The debate about rules versus balancing is a perennial one in law, of course, and such persistence is usually a sign that there are real advantages and disadvantages to the contending approaches.¹⁹⁰ But in this context, the case for more open balancing appears strong, at least when compared to the current doctrinal rules.

Justice Breyer is developing the most important new ideas about the First Amendment on the Supreme Court since Justices Brennan and Black. To say the least, it will be interesting to watch how his ideas evolve, and to see whether they will come to shape First Amendment doctrine on the Court as a whole.

CONCLUSION

In the particular area of privacy and speech, *Bartnicki* demonstrates that there is currently no single view that a majority of the Justices shares. But a majority does seem prepared to allow some new restrictions on speech to protect privacy. This is a development to be praised. But even in this area, working out the details of a new approach will be difficult, requiring elaboration of the complexities of privacy in its speech and nonspeech dimensions,

¹⁸⁹ Breyer, *Our Democratic Constitution* at 22 (cited in note 89).

¹⁹⁰ See, e.g., Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 Harv L Rev 54 (1997); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 Harv L Rev 22 (1992); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L J 943 (1987); Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 BU L Rev 917 (1988); Paul Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 Yale L J 1 (1987); Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court’s Balancing Test*, 76 Harv L Rev 755 (1963).

the complexities of different understandings of the role of speech and press in society, and a finely tuned accommodation of the competing interests. Above all, it will require the most sensitive attention to the risks that always attend limitations of speech. The only justification for taking these risks is the judgment—which I have now reached—that the risks of not doing so are greater.

Public Law

2002

Case Comment

Remedial and substantive horizontality: the common law and *Douglas v. Hello! Ltd*

Alison L. Young

Subject: Human rights. **Other related subjects:** Media and entertainment

Keywords: Celebrities; Freedom of expression; Injunctions; Photographs; Privacy; Publishing

Legislation: Human Rights Act 1998

Case: *Douglas v Hello! Ltd* (No.1) [2001] Q.B. 967 (CA (Civ Div))

***P.L. 232** The Human Rights Act 1998 (HRA) is heralded as “bringing rights home”, providing citizens of the United Kingdom with a comprehensive set of positive human rights. What is controversial is how far the HRA has a horizontal effect, placing private citizens under an obligation to protect the Convention rights of other individuals. The provisions of the HRA itself are unclear, placing the decision “firmly in the keeping of the courts”.¹ The issue came up for consideration in *Douglas v. Hello! Ltd*.² At first sight, the courts appear to have missed an opportunity to clarify this area of the law, providing a judgment that falls between the various academic models proposed. However, the judgment also paves the way for the future adoption of a strong indirect horizontality model. It appears that not only rights, but also responsibilities have been brought home.

Background

Douglas v. Hello! Ltd concerned a dispute between two rival celebrity magazines over photographs of the wedding of Michael Douglas and Catherine Zeta-Jones. The dispute was heightened, as the pictures would appear in the ultimate edition before the Audit Bureau of Circulation calculated circulation figures, providing the successful magazine with a predicted circulation boost and the ensuing possible increase in advertising fees. *OK!* acquired the right to exclusive publication of wedding pictures approved by the couple. Douglas and Zeta-Jones ensured exclusivity by organising security checks, publishing notices of photography bans to guests, and requiring all staff to sign confidentiality agreements. However, their efforts were not successful. Not only did security staff confiscate six cameras that had been smuggled past security checks, but also an upset Zeta-Jones telephoned the lawyers at *OK!* the day after the wedding, to inform them that she had heard rumours that *Hello!* were planning to publish photographs of the couple's wedding. *OK!* acted quickly, obtaining an interim injunction to prevent publication of the photographs from Buckley J. over the telephone a few hours later. The next day, Hunt J. granted an injunction to stop publication. The following day, *Hello!* appealed Hunt J.'s decision before a two-judge division of the Court of Appeal, who were unable to agree. A three-judge division of the Court of Appeal was convened the same day to re-hear the appeal. Brooke, Sedley and Keene L.JJ. unanimously agreed to overturn the injunction.

Their Lordships all agreed that section 12(3) HRA, combined with the principles of *American Cyanamid Co. v. Ethicon Ltd*³ provided the legal test on ***P.L. 233** which the decision to grant an injunction should be based.⁴ First, the court had to be satisfied that the application would be “likely to establish that publication should not be allowed at full trial”.⁵ Secondly, the court should apply the balance of convenience test of *Cyanamid*. The applicants advanced five arguments for the grant of an injunction at full trial, based on the torts of breach of confidence, malicious falsehood and interference with contractual relations, breach of copyright and a breach of privacy. Their Lordships rejected the first four arguments. The tort of breach of confidence was unlikely to succeed at full trial, as it was not possible to rule out the scenario that the photographs had been obtained by an intruder. An intruder could not have breached confidentiality, as there would not have been a relationship of trust or confidence between the couple, *OK!* and the intruder.⁶ The tort of malicious falsehood would not succeed at full trial, as *Hello!* had not lied when it stated that it had “exclusive photographs” of the bride and groom. The photographs were indeed exclusive to *Hello!*. No reader would have understood *Hello!*'s claim of “exclusive photographs” to mean that *Hello!* was falsely stating that it had

exclusive rights to wedding pictures.⁷ The tort of interference with contractual relations was unlikely to succeed at full trial, as there was insufficient evidence to prove the requirements of this tort, *i.e.* that *Hello!*, knowing of the contract between the couple and *OK!*, had instigated or been involved in the taking of illicit photographs, or that *Hello!* had known that the photographs had been obtained by unlawful means.⁸ Only Sedley L.J. remarked upon the claim in copyright, dismissing it as unsupportable.⁹

This left the claim in privacy. The privacy argument could only succeed either if their Lordships were willing to develop a new common law tort of privacy, or if the HRA had horizontal effect, allowing Douglas, Zeta-Jones and *OK!* to rely upon the Convention right to privacy against another private body, *Hello!*. All three of their Lordships agreed that, under normal circumstances, a couple's right to the privacy of their wedding was likely to result in an injunction against publication at full trial. However, the right of privacy retained by Douglas and Zeta-Jones was small, given that they had already agreed to sell wedding photographs to *OK!*. The couple merely retained a right of control over the selection of photographs for publication. Their right to privacy could be adequately compensated by damages and did not require a ban on publication of *Hello!*'s wedding photographs. The *Cyanamid* balance of convenience test also favoured damages as opposed to an injunction. The potential losses made by *OK!* could be adequately compensated by an account of profits made by *Hello!* through its publication of the wedding photographs. ***P.L. 234** *Hello!*, on the other hand, would suffer considerable losses, including publication costs, reprinting costs and the potential loss of an issue of its magazine just before the Audit Bureau of Circulation calculations, which could not be adequately compensated by damages.¹⁰

Models of horizontality

The question that remains is how their Lordships thought it likely that a right of privacy could be pleaded at full trial, and its implications for the horizontal effect of the HRA. In order to understand this, we need to examine the different types of horizontal effect that were commented upon in the decision: remedial horizontality and substantive horizontality. We also need to understand the various degrees of force of the horizontality created by the different models of horizontality: direct horizontality, strong indirect horizontality and weak indirect horizontality.

Remedial horizontality occurs when the courts have regard to Convention rights in a dispute between private parties concerning the remedies to be granted. Section 12(3) HRA creates remedial horizontality, as it requires courts to pay specific attention to Article 10 ECHR when granting injunctions to restrain publication.¹¹ Remedial horizontality does not create rights for individuals that can be pleaded in a court as the basis of a legal claim against another individual. Rather, an individual must have another legal basis for her claim, privacy being taken into account when determining this claim. For example, A may bring an action against B for breach of confidence, and A's right of privacy would be taken into account by the court when assessing whether to grant an injunction to protect confidentiality.

Substantive horizontality goes beyond remedial horizontality, creating substantive rights for individuals. A would be able to rely upon the HRA to protect the substance of her Convention rights. Sections 6(1) and 6(3)(a) HRA create substantive horizontality. Section 6(1) HRA states that "it is unlawful for a public authority to act in a manner incompatible with a Convention right". Section 6(3)(a) HRA expressly includes a "court or tribunal" in its definition of a public authority. Section 6(1) HRA goes beyond remedial horizontality, requiring courts to have regard to Convention rights not merely when deciding to grant remedies, but also when assessing the establishment of legal rights.

Section 12(4) HRA could be argued to support both remedial and substantive horizontality. Section 12(4) HRA requires courts to "have particular regard to the importance of the Convention right to freedom of expression" whenever the court is "considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression". As the duty of the court arises when considering whether to ***P.L. 235** grant any relief, it appears to be requiring only remedial horizontality. However, it could be argued that, in order to assess whether to grant any relief, the courts have to consider substantive rights, thus giving rise to the ability of section 12(4) HRA to found substantive horizontality.

How far courts are required to pay attention to Convention rights when applying the HRA depends upon the different models of horizontality: direct horizontality and strong and weak indirect horizontality. The strongest requirement is placed upon the court by the direct horizontality model advocated by Wade. If the HRA creates direct horizontality, then individuals can enforce Convention

rights directly in English courts against other individuals.¹² For example, A can enforce his right to privacy against B by simply pleading Article 8 ECHR and the HRA. The scope of A's right to privacy would be determined by the wording of Article 8 ECHR, as interpreted by decisions of the European Court of Human Rights. Direct horizontality provides a strong protection of Convention rights. It is also advantageous, as it helps to promote a human rights culture in the United Kingdom, as individuals know that they can always protect their Convention rights directly against others in English courts. However, direct horizontality is difficult to reconcile with the primarily interpretative obligation placed upon the judiciary by section 3(1) HRA.

If horizontality is indirect, A cannot plead Article 8 ECHR directly against B in order to protect her right to privacy. Rather, A has to rely upon another right in the common law upon which to base her claim. For example, A may rely upon the tort of breach of confidence, interpreted in the light of her right to privacy under Article 8 ECHR. Although easier to reconcile with the wording of section 3(1) HRA, the scope of indirect horizontality is uncertain; when can existing law be interpreted in line with Convention rights, and what is the scope of such Convention rights? The models of strong and weak indirect horizontality give different answers to these questions.

Strong indirect horizontality places courts under a duty to interpret the common law in a manner compatible with Convention rights, as interpreted by the European Court of Human Rights.¹³ Under strong indirect horizontality, courts would have to interpret A's rights under the tort of breach of confidence to comply precisely with the rights that A would have under Article 8 ECHR. Weak indirect horizontality provides courts with the power to develop the common law in a manner compatible with the values underpinning Convention rights.¹⁴ Under weak indirect horizontality, courts have the power to interpret A's rights under the tort of breach of confidence in line with the values underpinning Article 8 ECHR to protect A's privacy. For example, if Article 8 ECHR required that no photographs of A could be published by the media unless A had granted her permission to such publication, strong indirect horizontality would require the tort of breach of confidence to be interpreted so that *Hello!* would automatically breach the duty of confidentiality existing between *Hello!* and A if they published photographs of A without A's permission. Weak indirect horizontality would require the tort of breach of confidence to be interpreted to protect A's privacy, but would not necessarily require that *Hello!* automatically breaches the duty of confidentiality existing between *Hello!* and A if they published photographs without A's permission. A's privacy could be protected to a lesser extent, for example by holding that *Hello!* only breached its duty of confidence if it published photographs of A without A's permission, where the photographs were obtained by intrusive means.

There are thus two differences between strong and weak indirect horizontality. First, under strong indirect horizontality, courts are placed under a duty to interpret the common law in a manner compatible with Convention rights, whilst under weak indirect horizontality, courts are not placed under such an obligation. Secondly, under strong indirect horizontality, correspondence is with the specific content of Convention rights, relying upon the text of the Convention and its interpretation by the European Court of Human Rights. Under weak indirect horizontality, correspondence is not with regard to the specific text of the ECHR and its interpretation, but with the values promoted by Convention rights, allowing the common law to be different from the precise wording of the ECHR and its interpretation by the European Court of Human Rights.

Substantive or remedial horizontality?

In *Douglas v. Hello! Ltd*, all of their Lordships accepted that section 12(3) HRA gave rise to remedial horizontality. In addition, they held that the remedial horizontality created by section 12(3) HRA did not only extend to the Article 10(1) ECHR right to freedom of expression, but also to other rights that conflict with freedom of expression recognised in Article 10(2) ECHR, including the Article 8 ECHR right of privacy.¹⁵ This acceptance of remedial horizontality is uncontroversial, being a mere judicial recognition of the effect of section 12(3) HRA. Moreover, through recognising the importance of Article 10(2) ECHR, their Lordships have done much to calm fears that section 12(3) HRA gives too much weight to the right of freedom of expression to the detriment of other Convention rights. They recognised that, although freedom of expression was a "powerful card", it was not always the "ace of trumps".¹⁶ Freedom of expression is to be balanced with other Convention rights when courts consider the granting of injunctions, "principally by considerations of proportionality".¹⁷

The use of section 6(1) and section 6(3)(a) HRA to create substantive horizontality is also uncontroversial. Both Sedley and Keene L.J.J. argued that **P.L. 237* section 6(1) HRA required the court to have regard to Article 8 ECHR when considering a claim to a right to privacy.¹⁸ They also

recognised that the enactment of the HRA itself had an impact upon the incremental development of the common law. Sedley L.J. argued that the enactment of the HRA provided a “further impetus to the recognition of a right to privacy in English law”.¹⁹ Keene L.J. relied upon “the apparent obligation on English courts now to take account of the right to respect for private and family life under Article 8 when interpreting the common law”.²⁰ Not only does section 6 HRA take effect when interpreting existing common law rights, but it may also give rise to a duty or a power to create new common law rights, when it would be a mere incremental development of the common law to do so. Given the development of the tort of breach of confidence, it is easy to see how the development of a new tort of privacy was a mere incremental development of the common law. There would not appear to be many other areas in which the development of a new common law right that protects a hitherto unprotected Convention right would be a mere incremental development. However, there is a possibility that Convention-compatible interpretations of common law rights would eventually provide so great a support for that Convention right, that its adoption into the common law would be a mere incremental development. This may be the case for such Convention rights as the Article 3 ECHR right to life, and the Article 11 ECHR right to freedom of religion, as well as the potential development of more specific anti-discrimination rights based upon a combination of Article 14 ECHR with other Convention rights.

What is surprising is the use by two of their Lordships of section 12(4) HRA as a justification for the indirect horizontality of the Convention right to privacy, which requires courts to have “particular regard to the importance of the Convention right to freedom of expression”. Following the provisions of section 12(1) HRA, section 12(4) HRA applies “if a court is considering whether to grant any relief which, if granted, may affect the exercise of the Convention right to freedom of expression”. The strongest support for the creation by section 12(4) HRA of substantive as opposed to merely remedial horizontality is found in the judgment of Sedley L.J.. He argues that section 12(4) gives rise to the “direct applicability” of Article 10 ECHR, giving rise to its “horizontal effect”.²¹ Brooke L.J.'s reliance upon section 12(4) HRA is less clear. Section 12(4) HRA was invoked by Brooke L.J. in support of the plea of a right to privacy in English law by Douglas, Zeta-Jones and *OK!*. Consequently, he relied on section 12(4) HRA to justify substantive as opposed to purely remedial horizontality. Brooke L.J. relied specifically upon section 12(4)(d) HRA, which requires courts to have particular regard to “any relevant privacy code” in proceedings relating to journalistic material. Section 3 of the Code of Practice ratified by the Press Complaints Commission in November **P.L. 238* 1997 provided a relevant privacy code for the purposes of section 12(4)(d) HRA.²² Whilst Sedley L.J. relies on section 12(4) HRA to create substantive horizontal effect for Article 10(1) and 10(2) ECHR, protecting the Convention rights of freedom of expression and other Convention rights with which freedom of expression conflicts, Brooke L.J.'s reliance on section 12(4) HRA is more restrictive. The Convention right to privacy is only protected in cases regarding journalistic material, where there is a relevant privacy code. The tension between these two disparate applications of section 12(4) HRA has been partially resolved by the decision of Butler-Sloss P. in *Venables v. News Group Newspapers Ltd*,²³ where the court had to determine whether to extend an injunction prohibiting the publication of information regarding Thompson and Venables after their release from custody. Butler-Sloss P. quoted Sedley L.J.'s argument that “section 12(4) makes the right to life ... as relevant to the right to freedom of expression to the courts' decision”,²⁴ observing that Sedley L.J.'s remarks were “relevant to and helpful in” balancing Articles 10, 8, 3 and 2 ECHR.²⁵

Horizontality--a bang or a whimper?

Whether horizontality is a bang or a whimper, to adopt Phillipson's phrase,²⁶ depends upon whether the courts have adopted the direct or indirect model of horizontality, and whether that indirect model is one of strong or weak horizontality. The judgment clearly rejects direct horizontality. The couple and *OK!* were not able to rely on Article 8 ECHR directly before the Court of Appeal. Rather, privacy was protected indirectly, either through the courts having regard to privacy when determining whether to grant an injunction, or through the interpretation of the common law to give rise to a right of privacy. Although Sedley L.J. describes section 12(4) HRA as meaning that Article 10 ECHR is “directly applicable”, he does not appear to be using this term in its European Community law sense.²⁷ Such an interpretation would not fit with Sedley L.J.'s later statement that section 12(4) HRA merely “requires the court to have regard to Article 10”.²⁸ Thus, the HRA creates only indirect as opposed to direct horizontality.

Whether the Court of Appeal's decision supports strong or weak indirect horizontality depends upon whether the courts have an obligation or a power to protect privacy, and whether this obligation or power is to ensure that the common law is compatible with Convention rights, or with the values

underpinning Convention rights. Their Lordships' judgments do not provide clear support for either model. Nor do they believe that there is a need to decide which model to adopt in order to decide whether to protect a right to **P.L. 239* privacy.²⁹ The judgments appear to adopt a position between the strong and weak models of indirect horizontality. It is clear that both Sedley and Keene L.JJ. believe that section 12(4) HRA and section 6(1) HRA place the courts under an obligation, rather than merely providing them with a power to act. This indicates support for strong indirect horizontality, as indeed does Sedley L.J.'s citation of Hunt's Article in support of strong indirect horizontality.³⁰ However, this obligation is not to interpret the common law in a manner compatible with Convention rights, but to "have regard"³¹ to Convention rights, or to give them "appropriate respect".³² Moreover, Sedley L.J. recognises that the obligation created by section 6(1) HRA and section 12(4) HRA stops short of requiring courts to make changes that "undermine the measure of certainty necessary for all law".³³ The model outlined by Sedley and Keene L.JJ. is thus not as strong as that proposed by Hunt. But it goes beyond the weak model proposed by Phillipson. It clearly provides for a form of obligation, even if this is not absolute, as opposed to a mere power. Moreover, this obligation is clearly with regard to the Convention rights themselves, as opposed to the values underpinning Convention rights.

There are also indications that, when the Court of Appeal has another opportunity to consider which model of indirect horizontality it wishes to adopt, it will move towards strong as opposed to weak indirect horizontality. This indication stems from their Lordships either ignoring or calling into question four of the five main objections cited against strong indirect horizontality: the lack of incorporation of Article 1 ECHR; the fact that Article 1 ECHR, whether incorporated or not, does not require courts to adopt strong indirect horizontality in order to fulfil the United Kingdom's Treaty obligations; the absence of a provision for remedies against private individuals in section 8(3) HRA; the lack of strong legislative intent to impose obligations upon individuals; and the problems created by Convention rights requiring more than merely incremental developments of the common law.³⁴

Article 1 ECHR places national institutions, including courts, under a duty to ensure compliance with Convention rights. As Article 1 ECHR is not incorporated into English law, the argument is made that there can be no duty upon the courts in English law to ensure that the common law complies with Convention rights. Therefore, it is difficult to interpret Article 6(1) HRA as giving rise to strong indirect horizontality. However, Sedley and Keene L.JJ. did not feel constrained by a lack of incorporation of Article 1 ECHR and confirmed the duty of the courts to have regard to Convention rights. Brooke L.J. regarded it as "strange" that the lack of incorporation of Article 1 ECHR could prevent the courts from giving effect to Convention rights, given that **P.L. 240* Parliament had placed the development of the protection of Convention rights through the common law clearly in the hands of the judiciary.³⁵

The argument has been made that Article 1 ECHR itself, as interpreted by the European Court of Human Rights, does not require courts to ensure that the common law is compatible with Convention rights. Consequently, as the ECHR does not require strong indirect horizontality, there is no need for the courts to adopt a strong indirect horizontality model. However, even if Article 1 ECHR does not require the judiciary to adopt the model of strong indirect horizontality, it does not prevent the judiciary from adopting such a model should they so desire. Sedley and Keene L.JJ. did not act contrary to Article 1 ECHR when they placed courts under an obligation to have regard to Convention rights when interpreting and developing the common law.³⁶

A further argument against strong indirect horizontality is that section 8(3) HRA does not provide for remedies against private bodies. Consequently, strong indirect horizontality does not fit the provisions of the HRA: there is little utility in developing a strong protection of Convention rights if there is no ability to provide remedies when the rights are breached. The Court of Appeal appeared to assume that damages would have been available at full trial for the breach of Douglas and Zeta-Jones's privacy rights when determining whether or not to grant an injunction against publication.³⁷ Damages could arise either through the tort of breach of confidence, interpreted in a manner compatible with Article 8 ECHR, or through a new common law right of privacy.

Strong indirect horizontality places obligations upon private individuals. The rule of law would appear to require a strongly expressed legislative intent to create new obligations for individuals, and to ensure that they are fully aware of these obligations. There is no such legislative intent in the HRA. However, given Brooke L.J.'s statement that it is for courts to determine how far the common law protects Convention rights, it is difficult to see how the lack of an express legislative intent to create obligations for individuals could prevent the courts from developing strong indirect horizontality if they wished.³⁸

The only remaining objection to strong indirect horizontality is the policy argument that Convention rights ought not to require more than a mere incremental development of the common law. Convention rights are expressed in a vacuum; they do not take account of other private rights that may conflict with human rights, or the different legal traditions of the different signatory states. Consequently, Convention rights ought not to override completely these legal traditions, but should be incorporated into the legal system, balancing Convention rights and other legal rights and principles.

Both Sedley and Keene L.JJ. accepted this limitation upon the obligation of the court to have regard to Convention rights. Courts are not required to make more than incremental changes to the common law in order to protect **P.L. 241* Convention rights.³⁹ However, this restriction does not place too great a limit upon indirect horizontality. The common law had already been shifting towards Convention rights and values, even before the enactment of the HRA.⁴⁰ The limitation to only incremental developments may slow down the development of the common law, but a series of incremental changes may, in the long term, achieve the same effect as if courts were required to develop all aspects of the common law in line with Convention rights, even if this required more than an incremental change.

Conclusion

Douglas v. Hello! Ltd indicates that the courts are developing strong indirect horizontality of Convention rights in the common law: more of a bang than a whimper. Courts are required to have regard to Convention rights when developing the common law, bringing the common law in line with Convention rights. The only situation in which the courts would be unable to protect Convention rights by developing the common law is where such a development would require more than an incremental change to the common law. It is not just rights, but obligations that are being brought home. Strong indirect horizontality reinforces the legal protection of Convention rights, allowing individuals to sue other individuals as well as public authorities. Not only did Catherine Zeta-Jones and Michael Douglas have a right to privacy, but also *Hello! Ltd* had an obligation to respect their privacy. It also furthers the development of a human rights culture in the United Kingdom. A greater awareness not only of individual rights, but also of individual responsibilities towards the rights of others could help to ensure that human rights are protected in society on an everyday basis. The ability to bring legal actions to protect rights against individuals as well as public bodies would help to anchor the protection of human rights within United Kingdom society.

Alison L. Young⁴¹

P.L. 2002, Sum, 232-241

-
1. G. Phillipson, "The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper?" (1999) 62 M.L.R. 824 at 849.
 2. [2001] Q.B. 967.
 3. [1975] A.C. 396.
 4. [2001] Q.B. 967, para. 54 (Brooke L.J.), 1004, para. 135 (Sedley L.J.) and 1007, para. 148 (Keene L.J.).
 5. Human Rights Act 1998, s. 12(4).
 6. *Douglas*, n. 4 above, at 984, para. 58 (Brooke L.J.), 998, para. 112 (Sedley L.J.), 1012 (Keene L.J.).
 7. *ibid.* at 997, para. 106 (Sedley L.J.), 1009-1010, paras 155-158 (Keene L.J.), 996, para. 102 (Brooke L.J.).
 8. *ibid.* at 1010-1011, paras 159-163 (Keene L.J.), 997, para. 107 (Sedley L.J.), 996, para. 102 (Brooke L.J.).
 9. *ibid.* at 997, para. 108.
 10. *ibid.* at 984-996, paras 58-101 (Brooke L.J.), 997-1007, paras 109-144 (Sedley L.J.), 1011-1013, paras 166-171 (Keene L.J.).

11. I. Leigh "Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?" (1999) 48 I.C.L.Q. 57 at 80-82.
12. H.W.R. Wade, "The United Kingdom's Bill of Rights" in I. Hare and C. Forsyth (eds), *Constitutional Reform in the United Kingdom: Practice and Principles* (Hart Publishing, Oxford, 1998), pp. 61, 63-64 and "Horizons of Horizontality" (2000) 116 L.Q.R. 217.
13. See especially M. Hunt, "The 'Horizontal Effect' of the Human Rights Act" [1998] P.L. 423.
14. See G. Phillipson (1999) 62 M.L.R. 824.
15. *Douglas*, n. 4 above, at 1008-1009, paras 150-154 (Keene L.J.), 983, para. 54 (Brooke L.J.), 1003, para. 133 (Sedley L.J.).
16. *ibid.* at 982, para. 49 (Brooke L.J.).
17. *ibid.* at 1005, para. 137 (Sedley L.J.).
18. *ibid.* at 1001-1002, paras 128-130 (Sedley L.J.), para. 1012 (Keene L.J.).
19. *ibid.* at 997-998, para. 111.
20. *ibid.* at 1012, para. 167.
21. *ibid.* at 1003, para. 133.
22. *ibid.* at 994-995, paras 93-94.
23. [2001] Fam. 430.
24. *ibid.* at 453, para. 50.
25. *ibid.* at 453, para. 50.
26. G. Phillipson (1999) 62 M.L.R. 824.
27. *Douglas*, n. 4 above at 1003, para. 133.
28. Art. 249 E.C.
29. *Douglas*, n. 4 above, at 1001, para. 128.
30. *ibid.* at 1005, para. 137 (Sedley L.J.), 1012, para. 167 (Keene L.J.).
31. *ibid.* at 997, para. 111 (Sedley L.J.).
32. *ibid.* at 1002, para. 129.
33. *ibid.* at 993, para. 91.
34. G. Phillipson (1999) 62 M.L.R. 824 at 834-843.
35. *Douglas*, n. 4 above, at 993, para. 91.
36. *ibid.* at 1005, para. 137 (Sedley L.J.), 1012, para. 167. (Keene L.J.).
37.

ibid. at 995-996, paras 97-103 (Brooke L.J.), 1005-1007, paras 138-144 (Sedley L.J.), 1012-1013, paras 168-169 (Keene L.J.).

38. *ibid.* at 993, para. 91.

39. *ibid.* at 1002, para. 129.

40. See, e.g. *M. Hunt* [1998] P.L. 423 at 456; *Derbyshire C.C. v. Times Newspapers Ltd* [1993] A.C. 534 and *Reynolds v. Times Newspapers Ltd* [2001] 2 A.C. 127.

41. Hertford College, Oxford.

© 2011 Sweet & Maxwell and its Contributors



HEINONLINE

Citation: 93 Yale L.J. 581 1983-1984

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Mon May 2 15:20:20 2011

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/copyright/copyright.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0044-0094](https://www.copyright.com/copyright/copyright.do?operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0044-0094)

Book Review

Technology, Democracy, and the Manipulation of Consent

When Government Speaks: Politics, Law, and Government Expression in America. By Mark G. Yudof. Berkeley: University of California Press, 1983. Pp. xvi, 323. \$28.50.

Technologies of Freedom. By Ithiel de Sola Pool. Cambridge: Belknap / Harvard Press, 1983. Pp. 299. \$20.00.

Stephen L. Carter†

The critical problem for contemporary First Amendment theory is the unequal access that wealth can buy. Through its guaranty of free expression, the First Amendment supposedly protects the right of each individual to communicate his or her ideas. But as the Supreme Court recognized a few years ago, "virtually every means of communicating ideas in today's mass society requires the expenditure of money."¹ As we enter an age in which all aspects of communication are dominated by privately owned mass media in general and the modern electronic media in particular,² the difficulties grow more obvious and less tractable.

We live in a nation founded on the conceit that everyone ought to have a say in policymaking. The final authority of government is supposed to rest with the people. But that authority cannot be exercised—at least not very well—unless people have available to them all the information they

† Assistant Professor of Law, Yale University. Enola G. Aird, who first opened my eyes to many of these problems, provided helpful comments on an earlier version of this Review. Perhaps needlessly, I add that the analysis and conclusions represent only my own views.

1. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam).

2. As I shall use the terms in this Review, "mass media" or "communication media" refers to all available means, especially those privately owned, of distributing a message to a large number of recipients. The term "electronic media," although it has special reference to broadcasting and cablecasting, refers generally to all electronic means of transmitting messages.

need to make up their minds. Traditionally, the First Amendment has been considered an aid in the public's quest to learn all that it can about the day's vital issues. Were the resources of communication not so scarce, that model might even be accurate. But those resources *are* scarce. Not every message can reach an audience; not every question can be debated. To select the messages for transmission, we have relied mainly on the market, but the rise of the electronic media has laid bare what should always have been obvious. Since the necessary resources are scarce, those willing and able to pay have the ability to spread their messages. Those who lack the money lack the access to do the same; their principal First Amendment right is to listen.³

The messages they hear are, for the most part, uncritical of the status quo. When there is criticism, it is usually delivered in a tone of righteous indignation, a kind of "This-shouldn't-happen-in-America" approach, which in turn reinforces the idea that changes should come about only within the system. Bad government or bad corporate policies are portrayed as the result of bad people, not of a bad system. One may concede the validity of this message,⁴ yet quarrel with a method of controlling mass communication media which ensures that no other message is likely to be heard.⁵ How are the people to govern if their major sources of information give them only part of the story?

It is true that people cannot be forced to be responsible, and it is only occasionally moral to impose on others one's own sense of responsibility. But we do not face a situation in which the public makes a conscious choice not to be informed. We face instead one in which a real choice is rarely offered.⁶ The electronic media, which have the potential to provide so much information, also have the awesome power to edit or censor or bias the information that they deliver. This in turn can alter world views and lay to waste the processes by which the system is supposed to take account of the consent of the governed. The widely shared public intuition

3. Ironically, this hazard looms even as the dawn of the information age promises to make available to more people more information than ever before. See Patterson, *Television and Election Strategy*, in ACADEMY OF POLITICAL SCIENCE, *THE COMMUNICATIONS REVOLUTION IN POLITICS* 248, 250 (1982) ("[T]hese trends will provide more information for those who want it Unfortunately, many people may end up knowing less").

4. Though the message affirming the goodness of the system is not above criticism, citations to criticisms of its goodness would surely be gratuitous.

5. The First Amendment is not generally considered to embody a right to be heard. See, e.g., *Rowan v. Post Office Dep't*, 397 U.S. 728 (1970) (no right to send mail to individual not wishing to receive it); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (no right to use "loud and raucous" amplifier of speech).

6. Sometimes, of course, the views of those without substantial economic resources *are* presented in the media, usually as news stories. But it is important to bear in mind that such presentations are a matter of *grace*, not a matter of *right*. See J. BARRON, *FREEDOM OF THE PRESS FOR WHOM?* (1973).

is correct: The media *are* doing something to us.⁷ One of the things the media are doing is teaching us values; this in turn influences the way our democracy functions. The mass media do have some power to shape people's views, whether about the products that they should purchase or about the politicians for whom they should vote.⁸ Should anyone be so bold as to assert the contrary, then I think, as Charles Black has written in quite a different context, "we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter."⁹ The socializing power of the mass media is a serious problem and is not going to vanish. Moreover, it presents a threat to democracy as we have come to know it,¹⁰ and for that reason, we cannot afford to ignore it.

As a society, we do not quite ignore it. In the United States, where those things perceived as dangerous are usually regulated, broadcasters, at least, have come to be viewed as exercising a quasi-public function: profiting from their use of a scarce public resource (the airwaves) and therefore acting as "public trustees." Thus, the Supreme Court has said that the electronic media may be regulated "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."¹¹ This regulatory solution is a compromise and it has been a controversial one. But it is not easy to work out solutions that do not run roughshod over the First Amendment. Appointing a "media czar" of some sort, charged perhaps with ensuring that programming does not distort the mechanism of democracy, would invite totalitarian disaster. On the other hand, the public's fears of the power of the media are not wholly irrational. Left completely unregulated, the modern media could present serious threats to democracy. No concrete and convincing solutions to the dilemma have yet been proposed.

It is against this background that two recent books about mass communication in a democracy ought to be considered. One is Mark Yudof's *When Government Speaks*;¹² the other is Ithiel de Sola Pool's *Technolo-*

7. Of course, different people have different ideas on just what it is that the mass media are doing. Views range from the long-time contention of critical theorists writing from the left that the mass media deaden the consciousness and indoctrinate the public with an ideology that makes it impossible for individuals to recognize their own repression, see H. MARCUSE, *ONE-DIMENSIONAL MAN* (1964), to a general fear that by exposing young children prematurely to the problems of the adult world, the media are making it far more difficult to inculcate traditional values. See N. POSTMAN, *THE DISAPPEARANCE OF CHILDHOOD* 81-119 (1982).

8. See *infra* pp. 588-91 & note 44. For a rather polemical statement of the opposite view, see Karp, *The Lie of TV's Political Power*, *CHANNELS*, May-June 1983, at 37.

9. Black, *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 424 (1960).

10. See *infra* pp. 601-05. Of course, one may concede the threat to democracy and yet deny the need for regulation of media content. See Polsby, *Candidate Access to the Air: The Uncertain Future of Broadcaster Discretion*, 1981 *SUP. CT. REV.* 223, 257-61.

11. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). For a description of the most important doctrines promulgated to regulate broadcast content, see *infra* note 69.

12. M. YUDOF, *WHEN GOVERNMENT SPEAKS* (1983) [hereinafter cited by author and page num-

gies of Freedom.¹³ In the interaction of technology, media, and regulation, both authors see significant threats to democracy as most of us understand it. Both books represent earnest and painstaking efforts at finding ways to counter those threats. But neither Professor Yudof nor Professor Pool spends much time considering the threat posed when access to information is controlled not by the government but by those private interests able to spend enough money to purchase access for their points of view. Since neither Professor Yudof nor Professor Pool sets out to solve this problem, neither really offers a solution. Yet, as I shall argue in the pages to follow, a careful synthesis of the two may permit us to begin to find one.

I. THE FIRST THREAT: GOVERNMENTAL DOMINATION OF COMMUNICATION

The danger Professor Yudof discerns and wants to prevent is set out near the beginning of his book:

The expansion of government at all levels has increased its opportunity to communicate with the populace Technology has also contributed to the growth of government, creating more opportunities for government involvement and at the same time supplying the tools needed to govern on a larger scale. Among the most important tools are the mass media that provide direct access to the minds and attention of citizens The obvious danger is that government persuaders will come to disrespect citizens and their role of ultimate decider, and manipulate them by communicating only what makes them accede to government's plans, policies, and goals. The opportunities for such abuse are numerous.¹⁴

ber only]. Much of the analysis in *When Government Speaks* was first presented in Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979).

13. I. POOL, *TECHNOLOGIES OF FREEDOM* (1983) [hereinafter cited by author and page number only].

14. M. YUDOF at 6. After stating his thesis, Professor Yudof runs headlong into a significant obstacle: the lack of social science evidence that such abuse has occurred, or (if it has occurred) that it has had any significant impact. See *id.* at 71-89. This obstacle has led one reviewer to comment: "Yudof significantly contributes to the literature by demonstrating at length that there is no ground for any general fear that government has the power to dominate the marketplace of ideas enough to falsify consent. His demonstration will persuade almost everyone. Except Yudof." Shiffrin, *Government Speech and the Falsification of Consent* (Book Review), 96 HARV. L. REV. 1745, 1748 (1983).

Professor Shiffrin's criticism notwithstanding, the obstacle may be significant, but it is not insurmountable. The fact that the danger has not made itself manifest does not mean that the danger does not exist. Cf. I. ASIMOV, *FOUNDATION* 163 (1951) ("Any fool can tell a crisis when it arrives. The real service to the state is to detect it in embryo."). The major flaw in Professor Yudof's analysis is not that he tries to resolve a crisis that is at most embryonic, but rather that while plunging ahead to limit government speech in spite of the lack of evidence to support the danger, he shies away from trying to limit powerful private speech because of the lack of evidence to support the danger. See *infra* pp. 587-89.

The government's superior access to the communication media is an important problem; trying to find a solution is a risky task. Professor Yudof's resolution of the problem is ambitious and creative: He proposes a right of citizens to sue either to enjoin government expression or to gain a right of reply when that expression has the effect of "falsifying majorities," which is to say, when the government communication "distorts the judgment of citizens, advocates undemocratic or unconstitutional values, violates the right of citizens not to be called upon to pay taxes to support expression they find objectionable, or drowns out opposing messages by virtue of the government's ability to capture the listening audience."¹⁵ In the usual case, the litigant "would be attempting to vindicate the interest of all citizens" in protecting their right to make informed judgments unmanipulated by the government.¹⁶ In short, Professor Yudof recommends judicial enforcement of what might be called a "right to democracy."

This is heady stuff, and those who are already fearful of judicial power will no doubt cringe: Not only can the courts tell the government what to do and not to do, but under this proposal, they would even be able to tell the government what to say and not to say. Professor Yudof settles on this proposal only after a fascinating odyssey through work in several disciplines and only after considering and rejecting other means for accomplishing his end—denying government the power to manipulate our minds. One may quarrel with his goal, but if one grants its legitimacy, it is not easy to fault his analysis. In the following pages, I shall suggest not that his answers are wrong, but rather that he fails to take them as far as he should.

Professor Yudof makes a powerful case that the government does indeed have many opportunities to control the flow of information to the public or the way in which the public views the information in its possession.¹⁷ It is not likely that anyone has doubts on this point, but if doubts exist, Professor Yudof's careful review should assuage them. Having set forth the ways in which the government can manipulate public opinion, he moves on to explain in some detail why this poses a threat to the pluralist democracy that he envisions as the ideal. Critical to his view is the idea that consent means something more (or less) than consensus.¹⁸ His model values "the *opportunity* of citizens, groups, or organizations to influence those who govern and one another."¹⁹ He agrees with Alexander Meiklejohn that freedom of speech represents a crucial element in the

15. M. YUDOF at 204.

16. *Id.* at 204–05.

17. *Id.* at 51–66. Although he considers the point somewhat unclear, Professor Yudof apparently believes that the existence of mass communication media exacerbates the problem. *Id.* at 89.

18. *Id.* at 152–54.

19. *Id.* at 154 (emphasis added).

process of "verification of majorities"—in discovering what the people really think.²⁰ But he adds what Meiklejohn failed to consider:

There is the danger that the prestige and status of government will give its utterances an advantage in competition with private-sector communications. There is the danger that government will fail to disclose vital information only it possesses. And, most importantly, there is the danger that citizens will not perform their self-governing functions because the government itself has indoctrinated them to its point of view.²¹

He concludes that all branches of the federal government²² are potential abusers of their power and might participate in this "falsification" process, the engineering of consent to government programs through manipulation of information. The courts are his chosen branch for discovering and reining in falsification,²³ but he admits that executive officials who are prepared to mislead the public might not blink at the idea of ignoring or evading a judicial decree. Thus congressional action of some sort might also be necessary.²⁴

The gist of Professor Yudof's argument, then, is this: The potential evil of government indoctrination is so great that the First Amendment ought to be turned into a shield to protect from that indoctrination the processes of discussion and consent, processes crucial to the continuing vitality of pluralist democracy. So far, so good. Professor Yudof is a bit vague about many of the details of his proposal,²⁵ but that is to be expected. As with so many new and unusual proposals, the book is largely food for thought.²⁶

20. *Id.* at 154-55. See A. MEIKLEJOHN, *FREE SPEECH* 3-19 (1948).

21. M. YUDOF at 156.

22. While Yudof concentrates on the executive branch's speech, he also devotes specific attention to Congress, *id.* at 179-90, and the Supreme Court, *id.* at 190-99. He believes his analysis applies to state legislatures and courts as well. *Id.* at 179.

23. *Id.* at 200-07. Professor Yudof does not completely discount the role that other organs of government may play, but he clearly considers the courts best suited for the task. See *id.* at 178-99.

24. *Id.* at 190. This congressional pressure is part of the system of checks and balances that will, in Professor Yudof's view, help alleviate the problem of government manipulation of consent. See *id.* at 200-07.

25. To take just one example, Professor Yudof discusses in some detail *Bonner-Lyons v. School Comm.*, 480 F.2d 442 (1st Cir. 1973), in which the court ordered a local government to grant a private group the right to reply to notices issued by a public school committee. The *Bonner-Lyons* result cries out for a principled basis—and Professor Yudof's theory could provide one. Yet Professor Yudof equivocates on whether he considers *Bonner-Lyons* correct. See M. YUDOF at 298-99. If he is unwilling to embrace *Bonner-Lyons*, then it is not clear whether his theory goes substantially beyond current case law. See also *infra* note 26 (discussing explanatory power of Yudof's thesis).

26. Even in its present form, the thesis does possess a healthy degree of explanatory power. For example, by using this hypothesis on the limitation of government power to manipulate the flow of information, Professor Yudof manages to place on a principled footing a number of cases which, despite their appealing results, are not easy to tie to the Constitution and the Court's own precedents. For example, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish may decline, on religious grounds, to comply with state compulsory education law), is an important case which the Court recently sought to

No doubt others will comment on it, offering suggestions for modification, and Professor Yudof will certainly have more to say. But his theory still raises a question: What about *private* efforts at manipulating public opinion in order to falsify consent? Professor Yudof writes these out of his theory a bit too quickly.

The problem begins with his discussion of pluralism. He is careful to take note of the emergence in recent years of a large number of attacks on "the pluralist faith" by critics who have labeled pluralism either immoral or unattainable.²⁷ For the most part, Professor Yudof's responses follow a simple line: "[T]he answer to these criticisms is not less pluralism, but more."²⁸ His general view is that for all its faults and for all our failures to meet its ideal, pluralism is the best available theory of democracy.²⁹ In reforming the system, he argues, we should concentrate on bringing it closer to this ideal.³⁰

He might even be right, but if he is, then it is curious that he dismisses so readily contentions such as Professor Lindblom's that in the interplay of public argument needed to make pluralism work, large, wealthy corporations have an enormous advantage over everyone else when it comes to getting their messages across.³¹ Professor Yudof responds to that argument in this way:

That most citizens believe in free enterprise or private property does not necessarily mean that this is a result of corporate indoctrination.

limit, *see* *United States v. Lee*, 455 U.S. 252 (1982), probably because of its potential scope. Yoder "rests on a number of related factors" important to Professor Yudof's theories, foremost among them "the need for pluralism, the dangers of state indoctrination, the potential for state interference with the consent of the governed, the rights of parents to socialize their children as they see fit, and the power of teachers as communicators, given the respect with which they are treated." M. YUDOF at 231. Similarly, Professor Yudof is able to explain (with obvious reluctance) *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973), in which the court ruled that college newspaper editors could not be prevented by the college from spreading inflammatory segregationist propaganda—even though the college owned the newspaper. Although troubled by *Joyner*, Professor Yudof concludes that it can best be supported "by a policy of limiting the impact of government speech," because "[e]ditors, like teachers, ought not to be turned into unwilling conduits of government indoctrination—even in so important an area as policy on racial discrimination." M. YUDOF at 219–20. If one agrees with Professor Yudof's initial goal of limiting the ability of government to falsify consent, then this is a logical move; and it has the happy virtue of explaining as well why government-as-employer is unable to restrain the classroom speech of teachers-as-employees. *Id.* at 216. "If teachers were required to be automatons and to adhere rigidly to lesson plans and assignments of material promulgated by a central authority, the capacity to indoctrinate to a single ideological point of view would be increased." *Id.*

27. *See, e.g.,* C. LINDBLOM, *POLITICS AND MARKETS* (1977); R. WOLFF, *THE POVERTY OF LIBERALISM* (1968). Among the better-known critiques that Professor Yudof cites but does not address directly are H. KARIEL, *THE DECLINE OF AMERICAN PLURALISM* (1961), and T. LOWI, *THE END OF LIBERALISM* (2d ed. 1979). *See* M. YUDOF at 91 n.3.

28. M. YUDOF at 95.

29. *Id.* at 109. Again, he relegates to a footnote two of the most articulate critics of this view, this time Laurence Tribe and Mark Tushnet. *Id.* at 109 n.52.

30. *Id.* at 109.

31. C. LINDBLOM, *supra* note 27, at 201–13.

There may be all sorts of socializing influences; these beliefs may simply be a by-product of other socializing forces. This is a chicken-and-egg problem, to which Lindblom gives no satisfactory answer³²

He adds: "That corporate interests have sometimes triumphed does not mean that every triumph was a blow to other interests, or that corporate interests must always triumph."³³

I am not sure that either of these is really an answer to what Professor Lindblom has to say. Both Professor Yudof and Professor Lindblom are seeking to explain the same phenomenon—the broad American acceptance of doctrines that have the effect of increasing the concentration of corporate wealth—and it may simply be that their intuitions on a possibly unprovable point are different. However, Professor Lindblom's argument is stronger than Professor Yudof seems to believe. The "socializing influences" to which Professor Yudof makes reference must originate *somewhere*. I think that Professor Lindblom's argument is not so much that corporations by themselves conspire day after day to socialize America to their advantage,³⁴ but rather that our socialization into liberal democratic theory—including acceptance of the basics of market theory, private property, and the profit motive—has created an atmosphere in which members of society and large corporations will perceive their long-run interests as substantially identical. A corporation might lose today or tomorrow on a particular point of environmental law or securities regulation, but that has no effect on whether most Americans would agree that the corporation has the right to survive and make money. Moreover, there is no real forum for those who view capitalism as evil rather than good—at least not if they want to reach a substantial number of people with their views.

Professor Yudof does wade through much of the literature on the effects of mass communication media on listeners and viewers,³⁵ and he concedes that private interests, in the same way as government, probably do "often attempt to manipulate the processes of consent" and that "such efforts may not be wholly unavailing."³⁶ He takes explicit note of what he calls the "polemical" view that there exists "a false consciousness which allows individuals to be repressed without their being aware of it."³⁷ He does not so much refute this view as dismiss it as too pessimistic:

32. M. YUDOF at 101.

33. *Id.* at 103.

34. *But see infra* note 44 (citing evidence of overt efforts to do this).

35. M. YUDOF at 71-89.

36. *Id.* at 89.

37. *Id.* at 86. *See* H. MARCUSE, *supra* note 7, at 1-18.

[T]he real weakness in the polemicists' ideological view of government communication, culture, politics, economics, and the mass media (apart from the absence of empirical support for their suppositions about the communications powers of government and business leaders) is that in erecting a structure to explain public and elite acquiescence to things as they are, they have largely destroyed the hope for change What will enable the individual to overcome his own mind-set . . . ? In the absence of a cataclysmic national crisis of war or depression, why should people who think they are free, who think that they are making choices, and who think that fundamental American values are sound, reject their political, social, and economic arrangements?³⁸

If Professor Yudof is correct in his assessment of these arguments, he may be pointing less to a weakness in them than to one in the system: If the "polemicists" are correct, then there is no possibility of reform *within the system*. That is not the same as saying that there is no chance of reform at all. It only means that the system is the problem, not the solution.

The more important point to draw from all this, however, is somewhat different. If, as Professor Yudof contends, there is little satisfactory evidence to demonstrate how minds are molded, then his entire argument on government manipulation proceeds from the *suspicion* or *intuition* that it *could* happen and that if it did, pluralist democracy would be threatened. By the same reasoning, there is no basis for rejecting the possibility of mind-molding by private interests merely because the evidence is not firm. The suspicion or intuition that it could happen ought to be enough to spark analysis.³⁹ If falsification of consent threatens democratic values, then it ought not to matter who does the falsifying.

I stress this point because it is crucial to understanding both what Professor Yudof says subsequently and why his analysis should be carried further. Since he is able to dismiss from consideration the power of private interests to manipulate public opinion, he has little trouble making the argument that unrestrained government speech poses the greatest threat to the pluralist ideal. His reasoning from that point on is quite cogent, but it is occasionally overshadowed by the omission.

Even if Professor Yudof, in his admirable effort to restrict government power to falsify consent, too quickly dismisses private power to do the same thing,⁴⁰ he is hardly alone in this quick dismissal. In *Buckley v.*

38. M. YUDOF at 88.

39. The suspicion can be combined with the evidence that opportunities exist and that attempts are sometimes made to exploit them. See *infra* pp. 601-04.

40. See Shiffrin, *supra* note 14, at 1753 ("Yudof's zeal for protection against government speech ultimately blinds him to the dangers of corporate speech.") (footnote omitted).

*Valeo*⁴¹ and *First National Bank of Boston v. Bellotti*,⁴² the Supreme Court served notice that it will not lightly countenance restrictions on the spending of money to influence public opinion, notwithstanding the power which that approach concentrates in the hands of the wealthy and those with access to wealth.⁴³ If the Court's position is that public opinion is not shaped by those with money to spend, then the Court, like Professor Yudof, is probably wrong.⁴⁴ If instead the Court's position is that the First Amendment takes no notice either of inequality in wealth or of the differential access to media which that inequality can cause, then, as my father is fond of saying, "That's their story and they're stuck with it." But even if the Court is stuck with its answer, the rest of us may not be. To understand why, it is necessary to turn to the work of Professor Pool.

41. 424 U.S. 1 (1976). *Buckley* resolved a variety of challenges to the constitutionality of the Federal Election Campaign Act of 1971 and its 1974 amendments. Its most relevant holdings for present purposes involved the Act's limits on campaign contributions and expenditures. The Court upheld limits on contributions as sufficiently focused efforts to prevent corruption or the appearance of corruption. *Id.* at 28-29. The Court noted that one of the "'ancillary' interests" of these provisions was to "mute the voices of affluent persons and groups in the election process." *Id.* at 25-26. The Court struck down limits on individual expenditures independent of a candidate's wishes as unconstitutional restrictions of First Amendment guaranties, *id.* at 44-51, specifically rejecting the notion that "equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation," *id.* at 48.

42. 435 U.S. 765 (1978). *Bellotti* involved a Massachusetts criminal statute that prohibited corporate expenditures influencing "the vote on any question submitted to the voters, other than one materially affecting" the property or business of the corporation. *Id.* at 768. The statute specifically stated that referenda on personal taxation did not materially affect corporate interests. *Id.* Rejecting the argument that corporate speech was protected only to the extent that corporate property was involved, *id.* at 778-83, the Court held that the involved corporation's speech on the income-tax referendum at issue would clearly have been permitted to an individual, *id.* at 784-86, and that the state had failed to show sufficient harmful influence by corporations upon the democratic process to deny corporate speech on political issues, *id.* at 788-92. Professor Yudof is of the view that *Bellotti* was decided both correctly and consistently with his theory. M. YUDOF at 162-64.

43. A leading exponent of the theory that it is important to act to ameliorate the effects of wealth on the political process is Judge J. Skelly Wright. See Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982); Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976). For a well-reasoned presentation of the opposite view, see Powe, *Mass Speech and the Newer First Amendment*, 1982 SUP. CT. REV. 243. Professor Powe is of the view that if wealth breeds inequality of access, then we ought to try to equalize wealth, not limit spending. *Id.* at 282-83. Although wealth equalization is a noble goal, it seems safe to say that no matter how many academic commentators may recommend it, no politically acceptable equalization scheme lurks around a nearby corner. The problem with which Judge Wright has been grappling, and the one that I address in this Review, is what to do while awaiting the redistributive millennium.

44. Several commentators have recently observed an effect on voting patterns linked to corporate speech. See, e.g., Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505 (1982); Mastro, Costlow & Sanchez, *Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to Do About It*, 32 FED. COM. L.J. 315 (1980).

II. THE SECOND THREAT: GOVERNMENT REGULATION OF THE MEDIA

Any strategy designed to resolve the problem of private manipulation of public opinion must be carefully drawn to avoid violating the First Amendment. The difficulty is compounded because it has become common to point to government regulation of the content (or the ownership or almost anything else) of the mass communication media as a powerful threat to that amendment's guaranties of free speech and a free press.⁴⁵ Professor Pool's book is in this tradition and is probably the most painstaking and convincing argument yet presented for broad First Amendment protection for the modern electronic media. "The issue of the handling of the electronic media is the salient free speech problem for this decade," he warns.⁴⁶ Unless we act to secure the freedom of the electronic media, we will end up "ask[ing] in puzzlement where protections of the free press have gone."⁴⁷ And although Professor Pool does not say so in as many words, he clearly agrees with all those who have asserted that the freedom to speak is essential to American-style democracy.⁴⁸ If through over-regulation by government we lose that freedom, then our democracy, too, must die.

Despite the "polemical view" mentioned earlier that freedom of this kind is an illusion,⁴⁹ the last part of Professor Pool's argument seems intuitively correct. The point is old, even trite, but not without force, that freedom of speech is more important than a guaranty of enough to eat, because without the first, there may be no way to let anyone know if the second is violated.⁵⁰ And Professor Pool is certainly correct when he notes that governmental regulation of the content of speech—even electronically

45. See, e.g., Bazelon, *The First Amendment and the "New Media"*—*New Directions in Regulating Telecommunications*, 31 FED. COM. L.J. 201 (1979); Polsby, *supra* note 10; Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967). The current chairman of the Federal Communications Commission has expressed roughly the same view. See Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982). For a recent and cautious effort to see the other side of the argument, see Kaufman, *Reassessing the Fairness Doctrine: Should the First Amendment Apply Equally to the Print and Broadcast Media?*, N.Y. Times, June 19, 1983, § 6 (Magazine) at 17.

46. I. POOL at 10.

47. *Id.* at 189.

48. See, e.g., Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970).

49. See *supra* pp. 589-90.

50. Arguments of this type would be dispositive in the debate, were it not for the fact that they work the other way too. What good is freedom to speak if one has too little to eat and therefore is incapable of speech? Or, what good is freedom to protest hunger when there is no right to be fed? To whom should the protest then be directed? On the other hand, without freedom to speak, how can one fight for a right to be fed? This is a good game and could continue indefinitely, but it is a little wide of the point. In an ideal world, we would not be forced to choose between the right to speak and the right to eat. Cf. B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 170-86 (1980) (supporting rights to both equal share of "manna" and freedom of expression).

transmitted speech—can constitute a powerful weapon in an evil hand, no matter how beneficent the impulse that originated it. But governmental regulation is not the only threat; domination of the electronic media by the voices of those who can pay the most is also unhealthy for Professor Yudof's pluralist democracy. One of the strengths of Professor Pool's book is that he acknowledges this difficulty and even outlines a strategy for dealing with it—although, as will be seen, his strategy may not be sufficient.

Professor Pool begins by observing that we are moving toward "convergence" of all forms of communication media. Initially, the printing press, the telephone, and the broadcast media all had distinct purposes. Now the distinctions are blurring: Most long-distance telephone traffic is carried by microwaves, that is, it is broadcast;⁵¹ "[s]oon everything that gets printed will exist also in computer form";⁵² and so on. That is a natural, even predictable development. But "[t]he extension of electronic means to do better and faster what the older modes of communication did with lead, ink, and paper has inadvertent consequences for the sustenance of freedom."⁵³ The tradition of freedom for speech and print with governmental regulation of electronic media has continued into the late twentieth century, but it has continued in ignorance of substantial changes in the way the world communicates. The electronic media are swiftly replacing print as the primary means of communication. With the advent of electronic publishing, print as we now know it may soon disappear entirely.⁵⁴ At the same time, the development of cable and other new technologies may demolish the scarcity rationale for regulation of the electronic media.⁵⁵

Consequently, as we speed toward the twenty-first century, we are in danger of remaining tied to a tradition protecting a form of speech that no longer exists and a tradition regulating, on grounds that no longer exist, a form of speech that represents the primary means of communication. This paradox will be resolved, Professor Pool asserts, only if we take most of the doctrines that have been used to protect print and the spoken word from government interference and transfer them *mutatis mutandis* to the

51. I. POOL at 36.

52. *Id.* at 42.

53. *Id.* at 54.

54. *Id.* at 212–17. For Professor Pool, this is an especially important point. When all newspapers are transmitted electronically, whether by satellite or by cable, will the press then fall under the jurisdiction of the FCC? See *id.* at 1. Professor Pool supports total freedom for the electronic press "except where there are elements of monopoly." *Id.* at 219. Exceptions of this kind are vital to Professor Pool's theory, because he wants to defend a form of free access to the electronic media. See *infra* pp. 597–98. For a general discussion of issues raised by government regulation of electronic publishing, see Neustadt, Skall & Hammer, *The Regulation of Electronic Publishing*, 33 FED. COM. L.J. 331 (1981).

55. See *infra* p. 596.

task of protecting electronic communication. This is because in the years to come, the electronic media will perform the functions previously served by the spoken word and the printing press, and it is those functions, not the particular entities that exercise them, that the First Amendment must protect.⁵⁶

To those who follow contemporary constitutional scholarship, this effort to see the modern world as the Framers would have seen it is a familiar move.⁵⁷ To ask whether the First Amendment was somehow "intended" to protect the electronic media—to try to see the Framers' world through our eyes—is counter-historical nonsense. The proper question—and the one Professor Pool propounds and answers with his "convergence" argument—is this: In what ways are the electronic media *similar to* the communication media that the Framers sought to shield? For if it can be demonstrated that the electronic media are the contemporary analogues of the media with which the Framers were concerned, then the argument for full protection follows almost as a matter of course.

But the operative word is "almost." Professor Pool implicitly recognizes that the electronic media are capable of exercising over public opinion a degree of power and influence of which the Framers could not have dreamed. Consequently, the direct analogy does not work. Nevertheless, Professor Pool tries to provide the electronic media a degree of protection consistent with democratic ideals. He traces judicial protection of the freedom to speak, to write, and to publish, and he reaches what is surely an uncontroversial conclusion: "[T]he Court has given a wide swath of protection to speech that is conducted in the traditional media of communication."⁵⁸ The freedom of these traditional modes of communication has in this country historically been as close to being absolute as any freedom is.⁵⁹

56. In furtherance of this view, Professor Pool lists at the end of his book ten "guidelines for freedom" that he sees as necessary: (1) "the First Amendment applies fully to all media"; (2) "anyone may publish at will"; (3) no prior restraints, even in the electronic media; (4) "regulation is a last recourse" (and the market is the second to last recourse; his preference is for treating the right to communicate as a free good); (5) government may require "interconnection among common carriers" and "adherence to technical standards, without which interconnection can be difficult"; (6) "recipients of privilege may be subject to disclosure"; (7) "privileges may have time limits"; (8) "the government and common carriers should be blind to circuit use"; (9) "bottlenecks should not be used to extend control"; and (10) "for electronic publishing, copyright enforcement must be adapted to the technology." I. POOL at 244-49. Since these are not the most important parts of Professor Pool's analysis, I give them without comment.

57. See, e.g., Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 218-22 (1980); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 798-804 (1983); cf. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 134-36 (1977) (distinguishing Framers' "concept" from their "conception").

58. I. POOL at 74. Pool lists the "traditional media" as "print, meetings, parades, associations, and canvassing." *Id.*

59. As Professor Pool recognizes, however, not all speech falls within this "wide swath." See *id.* at 66-74. The Supreme Court has over the years listed categories of speech that are entitled either to less

If the ideal in these traditional media has been total protection for the right of the speaker or writer to be heard or read, the degree of freedom offered to those who transmit their words by modern electronic means of communication has fallen significantly short of that goal. It is possible to put aside for the moment the telephone system and what is left of the telegraph system,⁶⁰ because these are common carriers which, in return for receiving a virtual monopoly on the mode of communication the system employs, have traditionally been required to transmit the messages of anyone who is willing and able to pay the fare. A kind of content regulation exists under federal law, but it is aimed at the user and not at the carrier.⁶¹ Common carrier status, moreover, is aimed at promoting freedom to communicate, not at restraining it. If the telephone system, for example, is a "natural monopoly"—and this is the popular view⁶²—then only an enforced common carrier status will result in the system's serving every user at reasonable cost.⁶³

More important for Professor Pool's argument, as well as for the analysis I shall shortly present, is the regulation of the other electronic communication media, particularly the broadcast industry. In most countries, as Professor Pool points out, the broadcast industry is operated solely or primarily by the government.⁶⁴ The United States, however, chose to permit private ownership and operation of broadcast properties, subject to regulation in the public interest.⁶⁵ The original rationale for regulation was spectrum shortage: It simply was not possible for everyone who wanted to

protection or to no protection at all. See, e.g., *Friedman v. Rogers*, 440 U.S. 1 (1979) (commercial speech entitled to less protection); *Miller v. California*, 413 U.S. 15 (1973) (obscenity entitled to no protection). But Pool's main point is well taken.

60. Professor Pool tells the sad tale:

[W]ith the decline of telegraphy and the growing cost of messengers, Western Union has been forced to rely on the postal service and AT&T for its delivery system. Mailgrams, which by 1977 exceeded telegrams in words sent by a factor of five, go by teletype to a post office near their destination for delivery from there by the postal service. Ordinary telegrams are now mostly phoned. The sender of a telegram from Boston to New York dials a Boston phone number but is connected to a clerk in a Western Union office in New Jersey. The clerk transcribes the text and phones it to the New York addressee. The system is an anachronism.

I. POOL at 43.

61. See, e.g., 18 U.S.C. § 844(e) (1976) (prohibiting use of telephone to convey threat to use explosives); 47 U.S.C. § 223 (1976) (prohibiting obscene or harassing telephone calls). The constitutionality of § 223 was sustained against First Amendment challenge in *United States v. Lampley*, 573 F.2d 783 (3d Cir. 1978). The restrictions placed on the carriers themselves are more along the lines of 45 U.S.C. § 83 (1976), which prohibits a telegraph operator (or, for that matter, a railroad) from turning away a customer who is willing to pay.

62. Modern communication technology has thrown this proposition into dispute. See I. POOL at 36-37, 219-23.

63. The dream of providing a telephone for every household has apparently not been fulfilled. See *Most City Poor Said to Depend on Pay Phones*, N.Y. Times, July 27, 1982, at B1, col. 6 (two-thirds of New York City's poor do not have residential phones).

64. I. POOL at 109-12.

65. *Id.* at 112-13. "The alternative of a government monopoly was never seriously considered in America." *Id.* at 112.

broadcast to do so, and as a consequence, the government was forced to decide not only *who* would be allowed to use spectrum space, but also *how* the users would be prevented from using their space to manipulate public opinion.⁶⁶

Although there is a tendency on the part of industry representatives to act as though the nation has opted for a regime of censorship and intrusive government regulation, the truth is somewhat different. Over the years, government regulation of broadcast content has been tailored toward making the broadcaster a hybrid—part autonomous speaker, part common carrier.⁶⁷ The much maligned “public trusteeship” doctrine reflects a view of broadcaster as common carrier; the panoply of First Amendment rights protecting the core of the broadcaster’s message permits enormous autonomy. The compromise may be less than perfect, but it is plainly a compromise. There is little regulation of content, although a broadcaster may sometimes be punished for imposing on its audience grossly offensive material that the listeners neither expect nor desire to hear.⁶⁸ The Fairness Doctrine and the Equal Opportunities Doctrine have obviously meant less freedom for broadcasters to control every word that goes over the air, but they are in keeping with the image of broadcasters as a kind of common carrier: Although a broadcaster need not carry all speech, when it carries speech that affects public opinion on controversial matters of public policy, it must present more than one side.⁶⁹

66. *Id.* at 113–19. The Supreme Court officially embraced the concept of spectrum scarcity in *NBC v. United States*, 319 U.S. 190 (1943):

Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied.

Id. at 226.

67. Broadcasters would vigorously dispute the claim that they are in any part common carriers. Enforced common carrier status, the argument runs, would violate the First Amendment by requiring them to transmit speech they would prefer to ignore. The First Amendment, they would say, stands as an absolute bar against *requiring* anyone to let someone else use his or her facilities to speak. But that argument is not quite to the point. Broadcasters are not always common carriers. They become quasi-common carriers, for a limited purpose, at the moment that they run political or other programming giving rise to someone’s right of reply. Thus they are *in part* common carriers because they are required to carry *some* messages which they would prefer not to.

There is no reason to think that the First Amendment would have barred imposition of full common carrier status on the operators of communication systems, which are, after all, what broadcasters are. The First Amendment did not, for example, bar the imposition of common carrier status on the telephone system. First Amendment protection runs, if at all, only to the creators of the messages to be sent. Similarly, had the broadcasters been made full common carriers, the producers of programming would still have enjoyed First Amendment protections. Imposition of common carrier status on broadcasters was in fact considered and rejected early in the century. See I. POOL at 136–38.

68. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

69. The Equal Opportunities Doctrine is embodied in 47 U.S.C. § 315(a) (1976), which requires that any broadcast licensee permitting one candidate for public office to use its facilities must “afford equal opportunities” for other qualified candidates wishing to do the same. The Fairness Doctrine, which may or may not have a statutory basis in § 315, requires licensees to provide reasonable oppor-

Doctrines such as these are, in short, efforts at restraining the enormous power broadcasters might otherwise enjoy to mold public opinion.

For the most part, Professor Pool is critical of these developments.⁷⁰ He joins other critics in contending that the market could have allocated scarce spectrum space without the necessity for government intervention.⁷¹ The Supreme Court's 1969 decision in *Red Lion*,⁷² sustaining the Fairness Doctrine, was simply wrong in its acceptance of "[t]he notion that nature itself inexorably required the selective licensing of broadcasters."⁷³ If there ever was real spectrum scarcity,⁷⁴ it certainly has not survived the development of cable television. "Spectrum shortage is . . . no longer a technical problem but only a man-made one," Professor Pool asserts.⁷⁵ "By the time of *Red Lion* it was technically possible to provide as many channels on cable television as consumers would pay for."⁷⁶ Modern technology offers any number of methods for multiplying the number of channels that are available or for adding to the amount of information that can be stored or transmitted per unit time.⁷⁷ In other words, only the regulators—and the broadcasters, who want to maintain their oligopoly—block the path to unlimited spectrum capacity.⁷⁸

Cable television should end all this scarcity nonsense, according to Professor Pool. Cable promises practically unlimited capacity.⁷⁹ Professor

tunities for the presentation of conflicting views when the licensee addresses controversial issues of public importance. See B. SCHMIDT, *FREEDOM OF THE PRESS VS. PUBLIC ACCESS* 141-82 (1976).

70. See, e.g., I. POOL at 130 (power of state has become "weapon manipulated by interested parties to silence their opponents"); *id.* at 135 (difficult to reconcile governmentally imposed requirements with traditional concept of freedom of press). There is irony in Professor Pool's decision to oppose policies that are intended to further what he suggests as the aim of a "policy of freedom": "pluralism of expression rather than . . . dissemination of preferred ideas." *Id.* at 8.

71. I. POOL at 138. For similar arguments, see Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 20-24 (1959); Fowler & Brenner, *supra* note 45, at 210-13, 221-26. For an argument that the market by itself would also do an adequate job of ensuring the presentation of a diversity of opinion, see R. POSNER, *ECONOMIC ANALYSIS OF LAW* 546-48 (2d ed. 1977).

72. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

73. I. POOL at 142.

74. "Congress failed to recognize the possible transiency of spectrum scarcity. By the mid-1920's, there was awareness that the progress of technology might eventually overcome the shortage." *Id.* at 114.

75. *Id.* at 151. Professor Pool suggests that other new technologies will also play a role in ending the effects of scarcity, in that programming of various kinds will arise to satisfy public demand. See *id.* at 149-50. This development will not alleviate the shortage of access.

76. *Id.* at 142.

77. *Id.* at 152-54.

78. For example, a few years ago, the FCC considered increasing the number of radio stations by reducing the bandwidth of each from 10 to 9 kilohertz. See *Inquiry Concerning 9 kHz Channel Spacings for AM Broadcasting*, 44 Fed. Reg. 39,550 (1979) (requesting comments on proposal). The proposal was abandoned, Professor Pool says, because "[t]he broadcasters objected; they did not want more competitors." I. POOL at 152; *cf.* *Channel Spacing for AM Broadcasting*, 46 Fed. Reg. 56,214 (1981) (terminating rulemaking proceeding and extensively discussing costs without mentioning competition).

79. Professor Pool partly blames the FCC for the scarcity of broadcast spectrum space and argues that its jurisdiction should be interpreted as narrowly as possible in order to prevent implementation

Pool recognizes that a fear of the power of broadcasters and a desire to ensure fairness are among the major motivations for regulation of broadcast content.⁸⁰ He also concedes that left to its own devices, a cablecaster might not welcome all users onto its system, in turn spoiling the vision of limitless capacity.⁸¹ But the answer to that, he says, is for cities to make cablecasters act as common carriers and to require each cablecaster to construct a system with far more channels for "leased access"—that is, available to whoever is willing to pay—than the cablecaster itself plans to use.⁸² This way, there will always be additional capacity available if someone has a message to convey.⁸³ Through this and other innovative means, Professor Pool believes, the cities can ensure citizen access to cable without running afoul of the First Amendment.⁸⁴

This is a sticky point with First Amendment absolutists. Since Jerome Barron's call for a right of access to the media⁸⁵ was decisively rejected by the Supreme Court in *Miami Herald Publishing Co. v. Tornillo*,⁸⁶ the tendency in the literature has been to dismiss the notion that the public has any "right" to have its views aired in the media. Professor Pool seems troubled by the *Tornillo* result: "Barron's argument in *Tornillo* was not dismissible lightly."⁸⁷ Professor Pool's own view is apparently of the "no alternative voices" school—when the owner of the local communication medium has a virtual monopoly, some right of access ought to exist.⁸⁸

of policies that would result in similar scarcities in cable. See I. POOL at 160–66. He recognizes, however, that the Supreme Court has permitted the FCC to exercise some jurisdiction over cable. See *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

80. See, e.g., I. POOL at 119 (radio in 1920's "often looked upon as a potentially more dangerous instrument [than publishing] which could, without vigilance, destroy American ideals"); *id.* at 5 (regulation "a natural response" to proliferation of "great oligopolistic networks" of broadcasters).

81. *Id.* at 168.

82. *Id.* at 166–67, 186–88. Most cable television regulation is currently undertaken by the licensing authority, which is usually the city or county where the cable system operates or will operate. That may change, however, should legislation now working its way through Congress become law. See BROADCASTING, Oct. 3, 1983, at 36; Multichannel News, Nov. 7, 1983, at 3.

83. I. POOL at 188.

84. This strategy would do nothing to alleviate another risk: Even as more communication is shifting to cable, regulatory authorities are shying away from trying to guarantee that adequate cable reception be made available to all at reasonable costs. See Dean & Schmuckler, *Unfair Cable TV Prospects*, N.Y. Times, Aug. 29, 1983, at A19, col. 3. In any event, the FCC's recent decision to preempt local regulation of satellite master antenna television (SMATV) systems, see BROADCASTING, Nov. 14, 1983, at 60, casts doubt on whether cable operators will be able to provide anything close to universal service. Cable operators had counted on local authorities to prohibit SMATV systems in the lucrative apartment market, thus allowing cable operators to cross-subsidize cable installations in the less profitable home market.

85. See, e.g., J. BARRON, *supra* note 6; Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967).

86. 418 U.S. 241 (1974) (law giving subjects of some newspaper stories a right of reply held unconstitutional). Professor Pool is careful to remind the reader that Professor Barron himself argued and lost *Tornillo*. I. POOL at 133.

87. I. POOL at 238.

88. In particular, his view that some regulation of electronic publishing is appropriate when the publisher holds a monopoly, see *supra* note 54, is explicable in no other way. See also I. POOL at

Although not lacking defenders, this view is outside the First Amendment mainstream.

I do not want to get into this dispute too deeply, but I will note that the Framers of the First Amendment could not have dreamed that anyone would exercise over the democratic process the power held by those who will control the flow of information in the emerging electronic world. This qualitative distinction between electronic media and print weakens the strict analogy necessary to demonstrate the full protection hypothesis. Professor Pool believes that his proposal for freedom from regulation stands or falls on this point,⁸⁹ and he is very probably correct. He foretells the end of the scarcity rationale, but it will fall only if cable and other new technologies really do usher in a new era. If there is more of the same—domination of the flow of information, and thus of public debate, by those who can afford to pay the price—then the scarcity rationale will persist, no matter what remarkable technologies tomorrow may bring. Worse (from the point of view of those who advocate deregulation), as the growing electronic networks become the most important means of communication, pressures will grow for regulation based not on scarcity alone, but also on the degree of power exercised by those who control the network.

Professor Pool's convincing argument that total freedom in cablecasting depends on general access to the medium is important for advocates of free speech in the electronic media, but it is also useful in trying to resolve the difficulties left over from Professor Yudof's analysis. Those with different degrees of wealth really do have different degrees of access to the media of communication, which is one reason that Professor Pool expresses a rather forlorn hope that the right to communicate can somehow be made into a free good.⁹⁰ His book contains any number of reminders on the persistence of this inequality throughout history.

For example, in discussing the history of the freedom to print, Professor Pool writes: "Freedom of the press, like free speech, basically meant that individuals could express themselves. *Obtaining access to the needed resources was no strain on ingenuity.* All the government had to do was keep hands off; if it did so, motivated individuals would be able to publish their views."⁹¹ This is a common argument, but no matter how frequently it has been repeated, it was never really true. Of course "obtaining access to the needed resources" could place a strain on ingenuity, at least for

238-40 (natural monopolies may necessitate treatment as common carriers); *id.* at 246-47 (common-carrier status better than public ownership or regulation).

89. "The problem of access may become the Achilles heel of what could otherwise be a medium of communication every bit as free as print." I. POOL at 166.

90. *Id.* at 246.

91. *Id.* at 11 (emphasis added).

those with little income or wealth. Those with sufficient money have always been able to purchase access; those without it have had to rely on the civic virtue (read "charity") of the publishing community.

More important, as Professor Pool's own historical argument makes plain, this situation has worsened over time. The rise of each new form of technology has led to further inequalities in access. The government has routinely permitted private exploitation of each new form of communication.⁹² The market, in turn, has done what it is supposed to do—it has rationed a scarce resource. By the late nineteenth century, it was already too late to pretend that space to transmit one's message through that day's mass media was anything but scarce. Those with money or a message that would sell could indeed take advantage of the marvels of what then passed for modern technology. Those with unpopular messages to send—or those without basic civil rights (most Americans in the nineteenth century)—had no significant access.⁹³

The technological convergence that Professor Pool identifies can only make these problems worse. As more and more of our communication becomes electronic, standing on the street corner and handing out leaflets may become an increasingly pointless means for getting an idea across. And yet that is the archetypical means through which people with no money begin their protests. In the world that is rushing at us so swiftly, the minimally necessary tool will be not a photocopying machine or a printing press, but a computer terminal or home computer linked to the emerging electronic networks. The major battle of the welfare state in the late 1980's or early 1990's will almost certainly be over whether the federal government should absorb the cost of providing terminals to every household, much as, through rate regulation, the government has traditionally tried to spread the cost of providing every household with a telephone.⁹⁴

92. For example, the publishing industry began its expansion when the profit motive was introduced. *Id.* at 14. In the United States, the magazine publishing industry was aided by the growth of brand-name advertising and by favorable government action on postal rates. *Id.* at 20.

93. The rise of the electronic media only exacerbated this situation. "For the general public in a democratic country [a] high priority was broadcasting for mass audiences." *Id.* at 26. The airwaves were free, and as the real cost of receiving equipment fell, nearly everyone could have first radio, then television, to snatch from the air the signals that were broadcast for public consumption. The only signals available to be snatched, of course, were those for which there was a market. The poor man's *transmitter* was the telephone, because although that device, along with the radio and later, the television, became the communication equipment of the masses, only the telephone permitted its user to *send* a message. Using the telephone alone, it would be nearly impossible for a user to enlist significant support for a political program or ideology. Radio and television, in contrast, were from the start technologies through which the user could only *receive* messages. And the user, though not quite captive, is usually passive; he will hear only what those who control the airwaves wish to tell him. The airwaves, in turn, are controlled undemocratically according to a system intended primarily to make money.

94. This latter enterprise has apparently failed. *See supra* note 63.

Professor Pool, to his credit, does not ignore these difficulties, and his argument for imposition of common carrier status on cablecasters seeks to resolve a part of it.⁹⁵ But unless the right to communicate can really become a free good of some sort—and I readily confess my doubts—then his proposals will not be enough. Like Professor Yudof, he has treated the power of government as the major enemy. There is no question that the government has powers that it can use to subvert the democratic process, but it is simply wrong to pretend that government alone can do so. The question, then, is what can be done, consistent with the First Amendment, to limit the power of private entities to do the same thing.

III. GROPING FOR DEMOCRACY

Self-government, as I said earlier, requires access to the information needed for the task. We are moving into a world, however, in which information is controlled increasingly by those who are not totally disinterested in the outcomes produced by the system. This concentration of media control in a few hands, and the wealth-based differences in degree of access, have concerned commentators for years.⁹⁶ Moreover, the electronic media change the very nature of democracy. When all news was conveyed through print, vast segments of the American public were informed poorly or not at all. In theory, that lack of information provided a rationale for representative democracy, that is, for the election of representatives to make decisions. The electronic media, however, package their news into neat segments of a few dozen seconds per issue. Having watched or heard this “news,” vast segments of the population now consider themselves well informed and, as a result, expect their representatives to follow direct instruction on every issue. Representatives are no longer elected because they are wise, but because they are right, and notions about which positions are the right ones are crucially shaped by the media. Solutions to all these problems have been proffered, but each in the end has run up against the First Amendment barrier.

Perhaps there is finally a way around it. Professor Pool’s work provides the first step. For while he argues vigorously that the electronic media must be protected by the First Amendment, he does not contend that a right of access of some sort would violate that amendment—at least not when “elements of monopoly” exist.⁹⁷ The free flow of information is too important, he seems to be saying, to let it be determined on the basis of

95. See *supra* pp. 597–98.

96. There can be no question that this concentration has enabled those who control the media to limit or prevent transmission of messages with which they disagree. Professor Pool chronicles numerous incidents of restrictions of this kind. I. POOL at 119–29.

97. See *supra* note 54; pp. 597–98.

ability to pay. If he is right (which I assume for the sake of this argument), then this one idea—that the electronic media are *not* sacrosanct—can help us as we grope for ways to rescue democracy.

Professor Yudof's arguments provide the next step. He did not intend that his analysis of the danger of government power to manipulate information and falsify majorities be applied to private attempts to do the same thing. But these two types of manipulation present similar dangers. For every case in which the government has tried to shape consent, any number of private interests have tried to do the same. At nearly every point in his analysis, his arguments remain just as compelling if the word "government" is replaced by the words "powerful private interests." So if there are good reasons to try to protect the democratic process from the undue influence of the government, then there are equally good reasons to protect that process from the undue influence of those whose only claim to power is that they have money to spend.

Professor Yudof's argument has less to do with an assumption that government will always try to manipulate consent, or that it will usually succeed when it does try, than with a realization that the government has so many opportunities to manipulate consent that a mechanism should be created to prevent it from doing so. Much the same can be said about the concentration of access to media—and thus, ultimately, to the public mind—in the hands of powerful private interests. The problem is not that those interests will always try to manipulate the public, and it is not that when they do try they will always succeed.⁹⁸ Rather, the problem is that opportunities for manipulation abound.

Perhaps the best example is the amount of money available to large corporations seeking to mount media campaigns to change the public's mind on a given issue. There is evidence of the success of these campaigns,⁹⁹ and indeed, were they doomed to failure, then it is not clear why rational corporate managers would waste money on them. Yet under the Court's decision in *Bellotti*, it is not easy to see what can constitutionally be done to control this power.¹⁰⁰

Much of this might be counterbalanced if commercial television showed any real commitment to public affairs programming. But stories without a market (like newscasters without a market¹⁰¹) will in the long run be

98. Professor Lowenstein's careful study of the effect of "one-sided" spending campaigns on California ballot initiatives suggests that it is easier for those with money to *defeat* a particular initiative than to *enact* one. See Lowenstein, *supra* note 44, at 511, 542-47.

99. See *supra* note 44. Even without the evidence, the proposition that leads to Professor Yudof's analysis—that the *possibility alone* is dangerous—would still carry considerable force, given the enormous inequality in access that money can buy. See *supra* note 14.

100. See *supra* note 42.

101. Surely the dismissal of newscaster Christine Craft because of her age, her appearance, and

crowded out. The networks view their obligation not as informing the public, but as making money.¹⁰² So disasters, murders, wars, and the occasional man-bites-dog story dominate. Political campaigns are frequently covered as though the incumbent were the only candidate.¹⁰³ Those who challenge deeply entrenched interests are treated as freaks or ignored.¹⁰⁴

All of this is important because it helps demonstrate that many private interests either can or do use the electronic and other mass media to try to manipulate public opinion in any number of ways. The manipulation may be either gross or subtle. Professor Yudof, for example, concedes that popular support for the corporate liberal state must arise through a socialization process of some kind;¹⁰⁵ surely the mass media in general, and the electronic media in particular, play a key role in the socialization. And yet message space in the mass media is reserved for those whose messages are unthreatening and those who can afford to purchase access (who are also probably unthreatening). Those whose causes are unpopular may be made heroes on the evening news if their causes appeal to the producers or directors, villains or buffoons if they do not. In general, those involved in the production of news—for all that they might enjoy occasionally lashing out at the bad guys—tend to share the values of the system that affords them their power. These are the individuals who determine whether the views of dissenters are “newsworthy.” That places enormous power in a small number of hands, because for most of those who espouse unpopular views, that is the only airtime they will ever get. As a rule, they cannot afford to purchase any, and unless they stage large demonstrations—or even riots—they are not likely to find themselves invited even to appear

her on-screen failure to act deferentially toward men suggests that television news is in the entertainment business, not the journalism business—if there was ever any doubt. See N.Y. Times, Aug. 11, 1983, at C20, col. 5 (analyzing this point).

102. For general discussions of the relative success (or lack of it) of television in keeping the public well informed, see M. SCHUDSON, *THE NEWS MEDIA AND THE DEMOCRATIC PROCESS* (1983); Robinson, *Television and American Politics: 1956-1976*, PUB. INTEREST, Summer 1977, at 3. Professor Schudson accepts on faith that television reporters (and those who work through other media) want to keep the public informed, but he expresses doubts about whether they do a good job. Professor Robinson is of the view that although television definitely has had an impact on political preferences, it is not easy to predict what that impact will be, and as a consequence, intentional manipulation of preferences is not easy. Certainly most Americans believe that television (and other media) exercises considerable influence. See S. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 204-05 (1981) (citing poll results).

103. See M. SCHUDSON, *supra* note 102, at 14-19.

104. For example, it cannot seriously be asserted that any debate on the role or morality of capitalism is carried on in the electronic media. The value of capitalism, and indeed, of the system as it now exists, is assumed; when errors are exposed, the call is for reform, not revolution. One need not believe that revolution is the appropriate path in order to see that a marketplace in which only some ideas are presented is not truly free. If the liberal state is truly better than the alternatives, then it can surely handle the ideological competition. If on the other hand the liberal state cannot handle the competition—if most people really would become convinced by arguments on the other side—then why isn't that an argument in favor of presenting them?

105. See *supra* p. 588. I assume that this support is not innate.

on late-night talk shows.¹⁰⁶ If, as Professors Yudof and Pool apparently agree, free and open debate on issues of public importance is necessary for the healthy functioning of a democracy, then as the power to shape opinion (or to decide which opinions are heard, which amounts to the same thing) is concentrated in fewer hands,¹⁰⁷ the democracy may grow less and less healthy.

I say "may" because Professor Yudof could be right: It is possible that the wealth-based differentials in access to the media pose no serious threats to his pluralist ideal. But the opportunities for that abuse abound, and it is not too hard to imagine ways in which they could be seized. To take just one example, some years ago a science-fiction writer (whose name irretrievably escapes me) came up with a story about a conspiracy among the major television networks to make the public believe that something had happened that had not. The writer noted the futility of governmental denials appearing only in the newspapers—which fewer and fewer people are reading.¹⁰⁸ Could it happen? Possibly not, but suppose that it did.¹⁰⁹ Would it really be the case that the First Amendment would bar any attempt to keep the small number of people who control so much of the flow of information from doing so much damage?

The example can be made more concrete. The FCC has lately been considering whether to renew the license of a radio station in Kansas that broadcasts virulently racist propaganda, calling for the ambush and murder of black and Jewish people.¹¹⁰ Many civil libertarians have taken the difficult decision to support the station's right to be racist, and it may be

106. It is frequently emphasized that television coverage was crucial to civil rights efforts in the fifties and sixties, because the brutality with which segregation was defended entered the nation's living rooms and forced people to confront what was happening. The tragedy, of course, is that brutality, rioting, and death were necessary before the mass media would seriously entertain the issue. Those who incited violence may even have done so in an effort to draw media coverage. See D. LANGE, R. BAKER & S. BELL, *MASS MEDIA AND VIOLENCE* 91-93 (1969) (vol. 9 of *The Report to the National Commission on the Causes and Prevention of Violence*).

107. This phrasing is perhaps a bit inexact; it does not really matter *how many* people control access to information. It matters far more *what values* they share. If television and cable networks are generally operated by individuals who share a fundamental commitment to the preservation of the system, then the result is much as it would be if the networks were all owned by the same people. This is a point that advocates of "structural diversity," see Bazelon, *supra* note 45, seem to overlook. Assuring what on the surface appears to be diverse ownership will not assure diverse views. Unfortunately, there is no way to control content but to control content. If in all circumstances that is unconstitutional, then there is no way to control content at all. But see *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (sustaining restrictions on broadcast content); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding fairness doctrine).

108. See *San Antonio Papers Defy U.S. Trend*, N.Y. Times, July 5, 1982, at 17, col. 1 (noting general downward trend in newspaper circulation).

109. It is useful in this connection to recall what happened when just *one* radio network broadcast Orson Welles's reading of *The War of the Worlds* on October 30, 1938. See J. FURNAS, *STORMY WEATHER* 141-44 (1977) (describing panic of listeners). See generally H. CANTRIL, *THE INVASION FROM MARS* (1940) (incident provides insight into psychology of panic).

110. See *BROADCASTING*, May 30, 1983, at 54.

true that the station's broadcasts will not in fact lead to any ambushes or murders. But suppose every station in the community, or in the state, or in the country, decided to broadcast similar propaganda. Are we so confident in ourselves and our fellow citizens that we are willing to assert that there would be no effect? And if there would be an effect—if public opinion might be molded—would the government have no right to step in and protect the members of the groups against whom public opinion was being stirred?

A final, somewhat farfetched example might involve the development of a perfect device for hypnosis. This device would be capable of sending to home television screens a signal that, once observed by the viewers, would completely strip them of their will to resist whatever information or instructions were sent along. Does the First Amendment really mean that the government is helpless in the face of such a device? And if the example seems too absurd to be useful, consider the television industry's voluntary restrictions on the use of subliminal suggestion and the government's restrictions on the content of advertising.¹¹¹

A libertarian friend of mine frequently responds to such hypotheticals as these with a shrug and adds: "Then the good guys lose"—the implication being that it is better to lose in this fashion than to have the government strip away basic rights. But perhaps the good guys need not lose. All of these examples involve blatant attempts to manipulate consent, the evil of which Professor Yudof warns. The only reason the manipulation is possible is our decision to permit the control of information—which is surely the life's blood of any democracy—to become concentrated in a small number of hands, hands whose owners may not always have the public's interest in mind. The First Amendment is intended to promote the free discussion of public policy, not to permit special interests to manipulate that discussion or prevent it from taking place. I wish we lived in a world in which we could treat the First Amendment as an absolute bar to government regulation, but I fear that we do not. Our technology is passing the Constitution by.¹¹²

111. The *Television Code* banned subliminal suggestion in advertising. NAT'L ASS'N OF BROADCASTERS, *TELEVISION CODE* Program Standard IV-12, at 7 (22d ed. 1981). Although the *Code* is no longer in effect, broadcasters generally retain informal restrictions on the use of the technique.

Neoclassical economists traditionally have tried to explain advertising by arguing that it gives consumers additional information. See Nelson, *Advertising as Information*, 82 J. POL. ECON. 729 (1974). Much regulation of advertising seems to assume, however, that consumers are affected by something other than the information content. For example, Federal Trade Commission regulations prohibit the misleading use of the word "free" even when the reader or viewer would be unlikely to be taken in. See 16 C.F.R. § 251.1 (1983). Similarly, the FTC prohibits endorsements of products unless the endorser is stating his or her true opinion. See 16 C.F.R. § 255.1 (1983). Regulations of this kind assume that advertising appeals to something other than the recipient's intellectual faculties.

112. Cf. G. GILMORE, *THE AGES OF AMERICAN LAW* 65 (1977) ("Rapid technological change unsettles the law quite as much as it unsettles people.").

But solutions, as I said, are not easily found. A first step—and a very minimal one at that—would be to retain the Fairness and Equal Opportunities Doctrines, which the FCC now wants repealed.¹¹³ Not only should these guaranties of access be continued, but they should be enforced against cable operators as well.¹¹⁴ To the extent that a cablecaster, like a broadcaster, is part autonomous speaker and part common carrier, expansion should not be barred by the First Amendment; as Professor Pool points out, if absence of scarcity is to be the rationale for abandoning regulation, then absence of scarcity must first exist. In addition, perhaps the guidelines on public service programming, guidelines the FCC has recently viewed with indifference,¹¹⁵ should be retained and expanded, in the hope—and it is little more than that—that broadcasters and cablecasters might make use of this enforced opportunity and transmit for public view a real debate.

These solutions would not completely eliminate the opinion-molding power of wealth. It may be that a Yudof-style injunction against corporate spending would be appropriate when the court was able to make the same findings that Professor Yudof would require before determining that government was falsifying consent.¹¹⁶ *Bellotti* and *Buckley v. Valeo* stand as partial obstacles to an approach of this kind,¹¹⁷ but constitutional decisions, fortunately, are altered more easily than is the Constitution itself. Corporate spending to influence public opinion need not be eliminated completely. But it should be treated like other commercial speech, meaning that it can be limited, both in content and in form, to further vital state interests.¹¹⁸ Surely among the interests that would qualify for this description is the interest in preserving democracy.

113. See BROADCASTING, Aug. 8, 1983, at 66; TIME, Nov. 21, 1983, at 58. The substance of these doctrines is explained at *supra* note 69. I would not propose extending these doctrines to encompass the print media, but that may be a result of my own indoctrination with particular values.

114. Technically, these access guaranties already apply to cable operators. See 47 C.F.R. § 76.205 (1982) (Equal Opportunities Doctrine); *id.* § 76.209 (Fairness Doctrine). The FCC, however, has not sought to enforce them against cable operators. See Nadel, *A Unified Theory of the First Amendment: Divorcing the Medium from the Message*, 9 FORDHAM URB. L.J. 163, 216 n.215 (1982).

115. The requirement that broadcasters "devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community served," Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1257-58 (1949), originated as part of the Fairness Doctrine. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 377 (1969) (Fairness Doctrine requires that "broadcaster must give adequate coverage to public issues"). With a handful of exceptions, this requirement has been enforced, if at all, only in the evaluation of competing applications in the comparative renewal process. See, e.g., Chamberlin, *The FCC and the First Principle of the Fairness Doctrine: A History of Neglect and Distortion*, 31 FED. COM. L.J. 361 (1979); Comment, *Enforcing the Obligation to Present Controversial Issues: The Forgotten Half of the Fairness Doctrine*, 10 HARV. C.R.-C.L. L. REV. 137 (1975).

116. See M. YUDOF at 304-05.

117. See *supra* notes 41-42.

118. See *In re R.M.J.*, 455 U.S. 191, 207 (1982) ("substantial state interests . . . will support carefully drawn restrictions" on commercial speech); *Friedman v. Rogers*, 440 U.S. 1, 15 (1979)

A more radical solution (at least by American standards) would be for the government itself, whose awesome power both Professor Yudof and Professor Pool are trying to contain, to get into the mass media business. The government could establish a broadcast or cable network of its own—not an underfunded Public Broadcasting System or National Public Radio. If this government network actually served as a counterweight to the interests represented on commercial broadcast and cable networks, then some degree of diversity might be restored.¹¹⁹ Professor Yudof proposes restrictions on government-as-editor that would enable Congress to establish such a system with substantial editorial freedom.¹²⁰ Professional journalists might welcome the opportunity to work for a well-funded organization without any need to please commercial backers.

But that proposal, while it might help dampen the power of corporate speech, would probably do little to improve access. Access could be improved by the establishment of publicly owned common carrier stations (both for broadcasting and for cablecasting), with the aim of making air time what Professor Pool seems to think it should be—a free good. Time slots could be distributed through a lottery.¹²¹ A proposal of this kind would present practical problems (among them the question whether government ought to subsidize program production for those unable to afford to produce on their own), but there is no reason to fear that the problems would be insurmountable.

Only tradition and inertia stand against proposals such as these; there is no reason to think that the Constitution would be a bar to either.¹²²

(restriction on corporate speech justified to protect public from deceptive use of trade names).

119. The idea of creating a "real" (or "yardstick") publicly controlled network is certainly not new. See Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 241-42 (citing historical sources). But it would not be easy to ensure that the government's message would be different from what well-funded private interests were already saying. See Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 616 (1980). Thus a better idea might be the establishment of government-owned common carrier stations. See *infra* p. 606.

120. Professor Yudof does not want to prevent the government from ever controlling the speech of its employees. See, e.g., M. YUDOF at 241 ("teacher may not subvert the curriculum under the doctrine of academic freedom"); *id.* at 242 ("[G]overnment should not be disabled by the public-forum doctrine from communicating its messages through media over which it exercises editorial control."). He does propose, however, that when government delegates editorial power over a communication system it controls, then it must respect that delegation and must not interfere with editorial judgment (although the government is free to revoke the delegation entirely and take direct control of the communication system). See *id.* at 241-44 (citing Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123 (1974)). In creating the "real" publicly owned communication system mentioned in the text, officials could be made more independent by serving subject to Senate confirmation and for staggered terms, and perhaps by being ineligible to succeed themselves. The Corporation for Public Broadcasting is a good model in some ways, a poor one in others. See Canby, *supra*, at 1149-64.

121. This is Judge Bazelon's position as I understand it. See Bazelon, *supra* note 119, at 241-42.

122. I am assuming here that the delegation of editorial authority would eliminate the dangers of which Professor Yudof warns. Should the government act through its station to try to manipulate the flow of information, then litigation to enforce Professor Yudof's principle would be the appropriate response.

Moreover, either of the two might move commercial networks, frightened by the competition or by its prospect, to be more conscientious themselves.

It may be that the reader, having persevered to this point, remains unconvinced that any of these proposals is a good one. It may also be that none of them would work. But as long as we insist on our conceit, that the people are governed by their own consent, then it is our obligation to take what steps we can to preserve the freedom of that consent. Consent, like the public debate that ought to precede it, requires information. Professor Yudof has given us fair warning that it is possible to manipulate the flow of information and the mechanisms of consent. If nothing is done about the influence of the mass media and the different degree of access that wealth can buy, then as we move into Professor Pool's electronic world, we may be doomed to face manipulations of this kind. The manipulator, however, will not be Uncle Sam, but rather those with the money to spread their messages—Uncle Sam's Big Brothers. In short, unless we act to stop our slide, we will continue downward toward the New First Amendment, with its guaranties of freedom of speech for those who can afford it, and freedom to listen for those who cannot.

HEINONLINE

Citation: 22 Cardozo L. Rev. 1885 2000-2001

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Tue May 3 09:50:16 2011

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0270-5192](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0270-5192)

THE NEWNESS OF NEW TECHNOLOGY

Monroe E. Price*

Every new technology transforms the world around it. A century ago, in a gentle preface to his novel *Under the Greenwood Tree*,¹ Thomas Hardy wrote of the transformation of little church orchestras in village England. Humble and amateur community instrumentalists were being displaced by an “isolated organist” employing a newly manufactured and more cheaply distributed technology, the harmonium or barrel organ. The new device presented certain advantages in control and accomplishment, but, he suggested, the change caused the stultification of the clergy’s aims and resulted in loss of interest among parishioners. In these tiny hamlets the technology of musical development had consequences for participation, organization of the institution, the nature of the music that was played, and, Hardy seemed to be saying, for country life as well. Of these multiple and small transformations major changes in society take place.

Newness, a preoccupation with the unknown, a twinning of heralded benefits and fears of danger is one trope of restructuring that is evident throughout the process of legal and policy transformation. Every candidate for new information technology has invited a super-heated rhetoric of millennial social change, a balloon of Hardy’s modest and precise description of the effect of the harmonium. When wireless radio technology was introduced in the first decades of the twentieth century, world peace was said to be only a turn of the dial away.² The *New York Times* wrote: “Nothing so fosters and promotes a mutual understanding and a community of sentiment and interests as cheap, speedy, and

* Sadie and Joseph Dancyger Professor of Law, Cardozo School of Law, Yeshiva University and co-director, Programme in Comparative Media Law and Policy, University of Oxford, LLB Yale Law School, 1964. This Essay is adapted from a forthcoming book tentatively titled *Journeys in Media Space: Law, Identity and Technology in a Global Environment*. I presented this paper at the Institute for Advanced Study (information technology and society group) in fall 2000 as a Member in the School of Social Science.

¹ THOMAS HARDY, *UNDER THE GREENWOOD TREE* (Tim Dolin ed., Penguin Putnam 1999) (1872).

² See Susan J. Douglas, *Amateur Operators and American Broadcasting: Shaping the Future of Radio*, in *IMAGINING TOMORROW: HISTORY, TECHNOLOGY, AND THE AMERICAN FUTURE* 35 (Joseph J. Corn ed., 1986).

convenient communication.”³ Promised riches by hawkers of the new technology, investors poured enormous amounts of money into fledgling, often nearly bankrupt, wireless companies. As a guide to restructuring, newness in information technologies is almost always packaged with a stated capability for fulfilling dreams and, simultaneously, challenging existing institutions and mores.

It is possible that the satellite, the Internet, and other information technologies will lead to the greatest revolution in information since the invention of the printing press.⁴ The extent to which this will be the case is not the point of this Article. Rather, it is to ask how change in technology is conceptualized, evaluated, and manifested in the process of reshaping institutions and laws. Governments try to divine how the newness of information technology affects the porousness of boundaries, capacities of old institutions to regulate new realities, the cultural horizons that result from altered patterns of data and image flows. Then, based on inadequate information, states probe ways to manage what they think are the consequences.

Elsewhere, I have explored examples of the threat of the new: its articulation as a carrier of illegal and harmful content and the capacity of new information technologies to present or intensify potential mischief and dangers.⁵ Legislation to reshape modes of access and surveillance can be seen as an effort to deflect the use of new media for such purposes. In 1996, President Clinton established the President’s Commission on Critical Infrastructure Protection to investigate the potential for terrorism on the Internet and legislation ensued from that.⁶ A President’s Working Group on Unlawful Conduct on the Internet called for restrictions on anonymity in cyberspace, citing law enforcement’s inability to trace online fraud, hacking, and trafficking in child pornography, firearms, and drugs.⁷ A society that fears revolutionary,

³ *Id.* at 39 (quoting N.Y. TIMES, Aug. 15, 1899, at 6).

⁴ See Jonathan Wallace & Michael Green, *Bridging the Analogy Gap: The Internet, the Printing Press and Freedom of Speech*, 20 SEATTLE U. L. REV. 711 (1997); Michael Hauben, *The Expanding Commonwealth of Learning: Printing and the Net*, in NETIZENS: ON THE HISTORY AND IMPACT OF USENET AND THE INTERNET (1994), at <http://www.columbia.edu/~rh120/ch106.x16> (last visited Feb. 18, 2001).

⁵ THE V-CHIP DEBATE: CONTENT FILTERING FROM TELEVISION TO THE INTERNET xiv (Monroe E. Price ed., 1998).

⁶ See CRITICAL INFRASTRUCTURE ASSURANCE OFFICE, DEP’T OF JUSTICE, WHITE PAPER: THE CLINTON ADMINISTRATION’S POLICY ON CRITICAL INFRASTRUCTURE PROTECTION: PRESIDENTIAL DECISION DIRECTIVE 63 (1998); PRESIDENT’S COMM’N ON CRITICAL INFRASTRUCTURE PROTECTION, CRITICAL FOUNDATIONS: PROTECTING AMERICA’S INFRASTRUCTURE (1997). The Commission’s website may be found at <http://www.pccip.ncr.gov>.

⁷ See PRESIDENT’S WORKING GROUP ON UNLAWFUL CONDUCT ON THE INTERNET,

destabilizing, and dangerous dissent is prepared to vest in its government extended powers to defend the status quo. Terrorism or radicalism of dissent becomes another trope that justifies greater state authority.⁸

Another quality of newness is how we describe the social organization by which information comes from those who originate content to those who consume it. New media technology famously disintermediates, or is said to, altering the power of traditional entities such as department stores, political parties, and television networks.⁹ Policymakers who hope for a technology that destroys existing mediators—creating a freer path between consumer and producer of information—might be more tolerant of implementing problems than those who think that the new technology merely remediates (yielding different institutional arrangements in place of the old). Legislative and judicial doctrines often build on a static concept of mediators or gatekeepers, dependent on actors who can be held responsible.¹⁰

Media technologies, as they are implemented, scotch the snake of power but do not destroy it. The language of technological determinism, as a descriptor of what constitutes the new, is overblown in this regard. Of course it is true that states will lose some capacity for control as a result of the spread of communications technologies. There is no reason to privilege the existing arrangements of states and the distribution of power among them. Some states, however, will increase their capacity to monitor and control as a result of their means of marshalling the new technology. And there will be other, as yet unknown, shifts as well.¹¹ States where information is produced may gain power over states where information is consumed. It may be a hallmark of increased power to be a state where information is processed or uplinked to satellite. Power may come from control over vital elements of the hardware, such as the capacity to build microchips,

THE ELEC. FRONTIER: THE CHALLENGE OF UNLAWFUL CONDUCT INVOLVING USE OF THE INTERNET (2000).

⁸ See ELEC. PRIVACY INFO. CTR., CRITICAL INFRASTRUCTURE PROTECTION AND THE ENDANGERMENT OF CIVIL LIBERTIES: AN ASSESSMENT OF THE PRESIDENT'S COMMISSION ON CRITICAL INFRASTRUCTURE PROTECTION (PCCIP) (1998), available at <http://www.epic.org/security/infowar/cip.pdf> (last visited Jan. 15, 2001).

⁹ See Charles Firestone, *Digital Culture and Civil Society: A New Role for Intermediaries?*, INTERMEDIA, 22 no.6 (Dec.-Jan. 1994-95); see also Symposium, *Financial Services: Security, Privacy, and Encryption*, 3 B.U. J. SCI. & TECH. L. 4 (1997) (comments of Valerie McNevin noting the Internet's potential to disintermediate financial services).

¹⁰ See Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653 (1998).

¹¹ See James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177 (1997).

or control of software, as in encryption or filtering. States gain money and power when industries—gaming, pornography, or adventurous sale of pharmaceuticals—for various reasons, though often taking advantage of technology that allows new zones of immunity, relocate or establish themselves under the state's jurisdiction.

Throughout the global debate over new forms of producing and distributing information, the consistent and haunting question is whether technology overwhelms law and the capacity of a state to regulate. It is hardly ever that easy. New technology changes the frame for negotiation, for making decisions and for the formation and application of policy. It is much less the case that technological change eliminates either the need for law or reduces the capacity for establishing and enforcing norms to nothingness. What occurs, almost always, is a process of adjustment: norms and institutions that were created for one set of technologies adjust or erode. Where basic values and social needs are at stake, alternative modes of governance and standards emerge.

At the outset, the transformation appears radical. An entire construct seems dependent on an old form of industrial organization and assumptions about the structure of the media. Or even if that is not the case, then the capacity of the governing authority to enforce is, itself, dependent on assumptions that are in the process of being undermined. But even before the question of possibility arises, there is the issue of whether a technology is "new" in the sense that it calls for such a law-transformative moment. We need to be able to tell when a technological advance allows us to address a traditional problem in a new fashion, and, increasingly, we search for ways to maintain (or appear to maintain) traditional customs notwithstanding the introduction of technological change.

It is, however, popular to question the capacity of the state to engage in lawmaking and law enforcement, especially as technology advances and the implications of the Internet stagger the statist imagination. Jack Goldsmith has challenged those who ridicule the possibility of law:

The skeptics make three basic errors. First, they overstate the differences between cyberspace transactions and other transnational transactions. Both involve people in real space in one territorial jurisdiction transacting with people in real space in another territorial jurisdiction in a way that sometimes causes real-world harms. In both contexts, the state in which the harms are suffered has a legitimate interest in regulating the activity that produces the harms. Second, the skeptics do not attend to the distinction between default laws and mandatory

laws. Their ultimate normative claim that cyberspace should be self-regulated makes sense with respect to default laws that, by definition, private parties can modify to fit their needs. It makes much less sense with respect to mandatory or regulatory laws that, for paternalistic reasons or in order to protect third parties, place limits on private legal ordering. Third, the skeptics underestimate the potential of traditional legal tools and technology to resolve the multijurisdictional regulatory problems implicated by cyberspace. Cyberspace transactions do not inherently warrant any more deference by national regulators, and are not significantly less resistant to the tools of conflict of laws, than other transnational transactions.¹²

Newness, then, has many faces; it can be newness within technology (as in the design of the interface or shifts in control over computational processes). Newness can be found in the impact on altering notions of distance or altering the speed of processes that in a slower environment could not be accomplished. Newness can mean altered institutional arrangements, as when states lose power or intermediating institutions lose force. Newness can have epistemological consequences, as when technology changes a person's idea of self or of collectivity and when it challenges existing ethical norms. We could speak of newness if technology brought to bear new narratives, new apocalyptic stories, and new ideas of perfection or immortality. The newness of new technology can be measured by whether its introduction alters, profoundly, human behavior. These broader senses of the new are important even as we turn to the narrow sense of introduction of technology that is the focus here.

I. CAUTION AND PATIENCE

To look at this trope of newness in depth, I focus on a single judicial decision where a court was obliged to integrate new media technologies into its existing patterns of thinking. The opinions in the 1997 decision of the United States Supreme Court in *Reno v. ACLU*,¹³ taken together with opinions in related cases, furnish a bouquet of opportunities for understanding. In their opinions, the Justices see themselves as obliged to determine whether a new technology is such a departure from what has gone before that it demands new forms of conceptualization. The Justices also explore how to ride change—to make and define law while the technology to be regulated is still indeterminate and there is

¹² Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1200-01 (1998).

¹³ 521 U.S. 844 (1997). Other related cases include *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000) and *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

insufficient experience or knowledge to understand its actual impact and consequences. Examining this one example—in which the United States assessed the regulatory framework for the Internet so as to control indecency—has its analytic perils. Each society has its own distinct pattern of determining whether innovation in media technologies requires altered policies. Different societies have different mechanisms for rendering this judgment just as different societies have varied grids for determining which variables are significant. And in the United States, more than in many other countries, judges are instrumental in the defining process.

In the U.S. debate over media technologies and indecency, there is a specific rhetoric (not replicated in Europe) relating to the distinction between old media and new. As a consequence of constitutional tradition and judicial interpretation, every “new” media technology has to be dissected to see the way it functions measured against the template of the First Amendment.¹⁴ One question often asked is, does the newness of the medium differentiate it from, or make it similar to, newspapers, broadcasting, or cable? By so assessing the characteristics of the technology (and its surrounding social arrangements), its newness is tested to determine what features call forth doctrinal differences. This includes asking whether or how a technology can be “zoned,” establishing specific geographical or time areas for one form of programming or another. It also includes questions about whether the technology, coupled with the structure of distribution, renders the images on the screen more “invasive,” or, rather, more subject to informed choice and selection.

The technology models for the Internet in the 1996 Communications Decency Act (“CDA”) are the telephone as well as radio and television.¹⁵ However, the Internet poses no obvious opportunity, as radio and television familiarly do, to establish parts of the program day, safe parts and “freer” parts, watersheds or so-called safe harbors for protecting children from inappropriate content. Such devices, familiar from European practice and earlier efforts in the United States, divide the schedule into spans when indecent programming can be broadcast for adults under the somewhat old-fashioned assumption that children would not be so predominantly in the audience. Given global access, this approach

¹⁴ This process is superbly described in Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1103 (1993).

¹⁵ For an excellent discussion of questions concerning the constitutionality of regulations protecting children as discussed in *Reno*, see Eugene Volokh, *Freedom of Speech, Shielding Children, and Transcending Balancing*, 1997 SUP. CT. REV. 141 (1998).

would not work for the Internet. The architecture of the Net precludes the comforting notion that society can protect itself by having family viewing times, or times of lower brutality and reduced sexual programming. The new qualities of the Internet (its global quality) require constraints that do not distinguish by time period. On this score, much of the CDA is patterned after existing legislation prohibiting harassing calls on the telephone.¹⁶

A significant issue, in the U.S. framing of the question, was whether anything new or different occurs with the interaction of child and image on the screen in the newer technology as opposed to older technologies. Could it be the case, for example, that for all the complexity of distribution, for all the newness of new technology, there is little basis for distinguishing between what a minor saw on a computer screen and what he or she saw on a television screen?¹⁷ The psychological or cultural implications could be roughly the same. Qualities of technological newness might not be sufficient to change the standard of what should be permitted or banned from what had been present in legislative treatment of other similarly received images.

It was in the context of this conflict between the old and continuous or new and differentiated that the CDA came to the United States Supreme Court. Assessing newness requires knowledge of context, but the Court made remarkably clear that too little is reliably known about the behavioral assumptions or legislative rationale concerning the Internet to determine how to conceptualize the new technology. In a footnote to his opinion for the Court, Justice John Paul Stevens sternly points out that no hearings were held in the Congress on the provisions at issue in the case until after their passage. He quotes at length one senator's dismay at Congress's "willy-nilly" intervention in the Internet.¹⁸ Justice Stevens concludes his opinion by driving home the Court's dissatisfaction with "the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA."¹⁹

The Court thus found it difficult to rule decisively; its efforts were like a powerful automobile moving in a confusing dusk, forced to do something, but not necessarily in custody of all the relevant information. The Justices had to assess the nature of newness at a

¹⁶ See, e.g., Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899 (1998).

¹⁷ As it happens, the post-1996 technology meant that individuals would often view the Internet on their television screens, received through their cable.

¹⁸ *Reno*, 521 U.S. at 858 n.24 (1997) (quoting Senator Leahy).

¹⁹ *Id.* at 879.

time when the potential for change was great, but not yet realized, or even if realized did not exist in a manner that had an institutional filter. The Court was asked to furnish constitutional standards to guide Congress, but the governmental mechanisms for clarifying basic assumptions were still unclear. Fervent was the wish, among many in the technology world, for a recognition that the Internet was new in such a radical way as to call for a totally new jurisprudence that was wholly liberating. The forces for the new sought a ruling that would sweepingly defend the Internet from the hands of those inclined to regulate. Though the Court struck down the CDA, an impulse to the categorically new was deflected by the ordinary notion of deference, or perhaps of deferral, to the legislative branch and to the pull of the constitutionally familiar.

Because these decisions came before a judicial tribunal, one with limited expertise in media effects (though often called upon to make assumptions about such effects), one way to read the Court's decision in *Reno* may be in terms of the rhythm of decision making. The proper rhythm or pace can be formulated by asking when, or under what circumstances, is it appropriate to evaluate the implications of a technology. The provocative writings of Lawrence Lessig, especially his views on postponement and readiness, have addressed this issue. Two articles, *The Path of Cyberlaw*, and *Reading the Constitution in Cyberspace*, both written before *Reno*, proved unusually influential in this then-young constitutional field.²⁰ Several ideas basic to Lessig's scholarship seem to haunt the Justices' opinions. One is a plea for caution before policymakers impose a standard decision-making grid on the use of new technologies. Professor Lessig states, "if we had to decide today . . . just what the First Amendment should mean in cyberspace, . . . we would get it fundamentally wrong."²¹

In a second suggestion, Lessig cautions that one must be careful not to be swept away by metaphors from the physical world when thinking about cyberspace.²² Constitutional doctrine adapted from our preexisting environment may not be fully suitable in the brave, new context.²³ Circumstances, facts, and technologies change.

²⁰ Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743 (1995) [hereinafter Lessig, *Cyberlaw*]; Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869 (1996) [hereinafter Lessig, *Reading the Constitution*].

²¹ *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 777 (1996) (Souter J., concurring) (quoting Lessig, *Cyberlaw*, *supra* note 20, at 1745).

²² See Lessig, *Reading the Constitution*, *supra* note 20, at 886. This idea is a source for Justice O'Connor in *Reno*, 521 U.S. at 889 (1997) (O'Connor, J., concurring in part and dissenting in part) (citing Lessig, *Reading the Constitution*, *supra* note 20, at 886).

²³ See Lessig, *Reading the Constitution*, *supra* note 20, at 902-03 ("We come from a tradition of translation in constitutional interpretation; in a wide range of cases, the aim has been to preserve founding values as interpretive contexts have changed. . . . But

Existing conceptualizations (often based on metaphor) arise and may be necessary for day-to-day life. But transfer of category may be the mind's lazy approach to analysis. Taken together, these cautionary ideas suggest that the Court (or a court), muddling through, must wait and see before it prescribes solutions.²⁴

Indeed these notions have transcending and complex implications not only for jurisprudence in the Internet era but for all decisionmakers dealing with new media technologies. The idea that doctrine turns on timing means that there are moments in which insecurity about power ought to lead to its nonexercise or to a fuzzy outcome. Yet that conflicts with strongly held views about how constitutional determinations ought to be articulated by an entity like the Supreme Court consistent with obligations to communicate clearly and decisively to the public, the Congress, and other judicial tribunals.

Doubt and caution may be reasons for the Supreme Court not to take a case, but once taken, it is hard to accept the notion of the Court saying "we don't know yet, but here's the best we can say." When the plurality in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,²⁵ a First Amendment case from the cable television medium, came close to saying just that, Justice Kennedy responded angrily in dissent:

This is why comparisons and analogies to other areas of our First Amendment case law become a responsibility, rather than the luxury the plurality considers them to be. The comparisons provide discipline to the Court and guidance for others, and give clear content to our standards—all the things I find missing in the plurality's opinion. . . . We have before us an urgent claim for relief against content-based discrimination, not a dry run.²⁶

Furthermore, a position of doubt can conflict, as occurred in *Reno*, with an extraordinary pressure to categorize the new technology, now, as a technology of freedom, unhinged from the ambivalent and government-justifying history of the regulation of broadcasting. The publishing industry, library associations, colleges and universities—an enormously impressive list of plaintiffs—urged (unsuccessfully

translations in cyberspace will not always be clear.").

²⁴ See Lessig, *Cyberlaw*, *supra* note 20, at 1754. Lessig states:

Cyberspace is elsewhere, and before carving the First Amendment into its silicon, we should give the culture a chance to understand it. . . . If there is sanction to intervene, then it is simply to assure that the revolution continue, not to assure that every step conforms with the First Amendment as now understood.

Id.

²⁵ 518 U.S. 727 (1996).

²⁶ *Id.* at 787 (Kennedy, J., concurring in part and dissenting in part).

on this narrow ground) that certainty was necessary and that the proclivity to regulate by Congress should be nipped in the bud by a clear decision applying the greatest possible protection to Internet communications. As the Court states in a different context, "liberty finds no refuge in a jurisprudence of doubt."²⁷

The second important *Reno*-related contribution of Professor Lessig—his articulation of a tentativeness about facts and about how to capture and reduce the array of facts available—tends to the poetic. His arguments suggest how complicated it is to adapt the metaphors and analogies that have influenced the constitutional doctrine of the physical world to the world of cyberspace, particularly when that world is itself still being constructed, both physically and conceptually.²⁸ Time may be necessary to transcend metaphor. This, then, is a further challenge: to acknowledge that many legal systems depend on metaphors that are fragile and limited and that misportray evolving circumstances. Implicit in this suggestion is a critique of the standard process of extending law, suggesting that shifting to cyberspace from more physical counterparts requires a rethinking of how categories are established, and who determines the character of the real world (in the U.S. case, the respective role of Congress, administrative agencies, and the courts).

The opinion of Justice O'Connor in *Reno* illustrates the problem of adjusting to metaphors while assessing a new technology. She relates a wish to think of the Internet as a land, inhabited by a number of institutions, some of whom are purveyors of indecent material. For her, the relevant ways of thinking about the law are to consider the applicability of legal analogies. In her opinion she looks, especially, toward decisions concerning the more physical world of bookstores and their locations. There, the Court has endorsed the establishment of "adult zones," specified physical sites that deal in pornographic materials and that can be segregated to particular parts of towns and cities, thus removed from children. By relying on the notion that this is a "zoning case"²⁹—which is itself a vision of cyberspace—she makes her own leap, coping with the new but well within existing modes of fashioning principles.³⁰

²⁷ *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992).

²⁸ See Lessig, *Cyberlaw*, *supra* note 20, at 1753 ("[N]o court should purport to decide these questions finally or even firmly. Here especially should be the beginning of a dialogue, which perhaps more than others is meant to construct its subject more than reflect it.").

²⁹ *Reno v. ACLU*, 521 U.S. 844, 886 (1997) (O'Connor, J., concurring in part and dissenting in part).

³⁰ See Lessig, *Reading the Constitution*, *supra* note 20, at 886-95.

But Justice O'Connor demonstrates that she cannot be sure the analogy would work. Is zoning in cyberspace the same as zoning in the physical world? Justice O'Connor expresses doubts whether the received doctrine respecting speech-related zoning—rules that she finds acceptable in their traditional application to street corners in cities—should apply in cyberspace.³¹ The image of the adult bookshop, with its masked windows, the forbidden entry, the lonely monitor working into the night, translates into cyberspace only with difficulty. “Before today,” Justice O'Connor writes, there was no reason to question the approach of zoning, for before the Internet case “the Court has previously only considered law that operated in the physical world, a world with two characteristics that make it possible to create ‘adult zones’: geography and identity.”³² This new layer of abstraction is what forces the rethinking of the Constitution and basic principles in the world of cyberspace.³³ Thus, Justice O'Connor retains her commitment to the architecture of her past constitutional doctrine, but recognizes the complexity of extending it to the new technologies.

How does a decision maker act in such a moment of indecision—a moment when it is unclear whether the judicially accepted verities of a physical world exist in the cyberspace counterpart? Justice O'Connor concludes,

Although the prospects for the eventual zoning of the Internet appear promising, I agree with the Court that we must evaluate the constitutionality of the CDA as it applies to the Internet as it exists today. Given the present state of cyberspace . . . the [statute's] ‘display’ provision could not pass muster.³⁴

However, she justifies her belief that it will pass eventually by saying, “Cyberspace is malleable. Thus, it is possible to construct barriers in cyberspace and use them to screen for identity, making cyberspace more like the physical world and, consequently, more amenable to zoning laws. This transformation of cyberspace is already underway.”³⁵

II. ASSESSING NEW TECHNOLOGY

To determine the newness of a media technology one must have a description of it, fixing the points for a factual assessment. To achieve such a description involves notions of relevance. It may be important, for example, that new satellite dish technology

³¹ See *Reno*, 521 U.S. at 888-91.

³² *Id.* at 889.

³³ See Lessig, *Reading the Constitution*, *supra* note 20, at 885-88.

³⁴ *Reno*, 521 U.S. at 891 (citation omitted).

³⁵ *Id.* at 890.

is handkerchief-sized, but the relevant question is whether a reduction of diameter has legal and constitutional consequences. In societies where the state seeks to monitor or control the viewing habits of its citizens, the largeness or smallness of satellite dishes may be of great significance. What makes a new technology new for purposes of legal or constitutional analysis may often be a matter of the extent to which the new technology threatens, sustains, or even enhances a particular state's position in the marketplace for loyalties.³⁶ In this respect, the concept of technological newness may function as cover for very traditional state concerns. What is new in a new technology may simply be those aspects of the technology that challenge state control or render current legal doctrine untenable.

Assembling facts to evaluate which attributes of significance have become realized or are likely to exist within a period relevant to a societal decision is central, then, to the project of deciding what is paradigm-shifting about a technology. Almost by definition, however, newness is often a series of claims, a series of promises, and a series of hopes. The questions of changing constitutionality or paradigm-shift arise during times of aspiration, before industry structure and performance in the world are fully realized. The potential for stalemate is obvious. Financial investment in the industry may not be maximized until a reliable legal environment is established, yet the decisions concerning norms cannot take place until there is sufficient information.

Let us turn to *Reno* again for an example of the relevance of a factual base. One background issue of significance was whether circumstances existed that allowed parents easily to control what their children saw on the Internet.³⁷ Danger to children, after all, was the big fear (justified or not) motivating Congress, the dark omen confounding the Internet's benefits. The CDA put the onus of keeping the Internet clean largely on the senders of information. Providers or senders had to ensure, more or less, that only material "not indecent" flowed through the wires if young people would have access to it. Online providers were immune from responsibility only if they took specifically designated steps to assure that the recipient was not a minor. However, because of the shape of American First Amendment jurisprudence, this congressional approach would not be constitutional if less

³⁶ See Monroe E. Price, *The Market for Loyalties: Electronic Media and the Global Competition for Allegiances*, 104 YALE L.J. 667 (1994).

³⁷ For a full discussion of these questions, see Mark S. Nadel, *The First Amendment's Limitations on the Use of Internet Filtering in Public and School Libraries: What Content Can Librarians Exclude?*, 78 TEX. L. REV. 1117 (2000).

restrictive alternatives were available to meet the legitimate goals of Congress.

Thus, in the *Reno* litigation, one of the major questions was whether or not such solutions—less restrictive alternatives that would allow speakers to be unfettered (or less fettered)—are truly available. One of the revolutionary ways of thinking about “alternatives” was technology similar to the V-chip, software-filtering systems that would allow screening by the user, rather than restrictions on the sender.³⁸ But a determination that a technology provides a “less restrictive alternative” is necessarily based on an assumption that the technology actually exists (or is very likely to exist). The evaluation of which alternatives are viable or restrictive are questions concerning what the world is really like. Justices must determine what the world of technology and behavior can do or reliably promises to do at the moment in question and how to integrate a desired or imagined future into current constitutional doctrine.

In *Reno*, Justice Stevens, desirous of invalidating the burdens Congress imposed on the senders of information, had to stretch to make his point on the utility of alternatives. Outlining the anticipated types of devices available through the Internet, he writes, in carefully chosen words:

Systems have been developed to help parents control the material that may be available A system may either limit a computer's access to an approved list of sources that have been identified as containing no adult material, it may block designated inappropriate sites, or it may attempt to block messages containing identifiable objectionable features.³⁹

Justice Stevens notes that current technologies include parental control software that can screen for suggestive words or for known sexually explicit sites, though there is no software that can screen for sexually explicit images.⁴⁰

The passive voice suggests the distance Justice Stevens places between his convictions and the description of reality that he presses into service. He also employs a device available to reviewing courts like the Supreme Court. On a “matter of fact” (like whether these devices are available), a Justice of the Supreme Court can rely on the trial court as a “finder of fact.” Here, the

³⁸ For a review of these issues in advance of the Supreme Court's 2000 decision in *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000), see the perceptive student Note by Barton Beebe, *Parental Initiative in the Age of Signal Bleed*, 109 YALE L.J. 627 (1999).

³⁹ *Reno*, 521 U.S. at 854-55.

⁴⁰ See *id.* (relying on finding 72 of the trial court, citing *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D.Pa. 1996)).

District Court had, according to Justice Stevens, determined from the evidence that “a reasonably effective method by which parents can prevent their children from accessing material which parents believe is inappropriate will soon be widely available.”⁴¹ Note that the method is not yet available, and the “evidence” is probably a self-serving declaration by those who hope to introduce such software that it will be available.⁴²

This technological meliorism has been criticized. One year after the Court handed down *Reno*, Professor Lessig published an influential law review article, *What Things Regulate Speech: CDA 2.0 vs. Filtering*.⁴³ In the article, he warns that even if the less restrictive means relied on by the Court became available in the form of effective filtering software, this technology would be more intrusive on speech than the provisions rejected in *Reno*. He states,

My sense is that this first major victory—in *Reno v. ACLU*—has set us in a direction that we will later regret The “less restrictive means” touted by free speech activists in *Reno* are, in my view, far more restrictive of free speech interests than a properly crafted CDA would be. And unless we quickly shift ground, we will see Congress embracing these less protective (of speech) means, or worse, we will see the success of the President in bullying industry into accepting them.⁴⁴

Professor Eugene Volokh was also dissatisfied with the reasoning.⁴⁵ In his view, the most troubling aspect of Justice Stevens’s opinion was the statement that the CDA’s burden on free speech “is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.”⁴⁶ The important phrase, to Volokh, is “at least as effective.”⁴⁷ To him, no alternative could reach this standard. “None of the Court’s proposed alternatives to the CDA—or any other alternatives I can imagine—would have been

⁴¹ *Reno*, 521 U.S. at 846 (emphases omitted).

⁴² The Court also made much of the fact that “existing technology did not include any effective method for a sender to prevent minors from obtaining access to its communications on the Internet without also denying access to adults.” *Id.* at 876. In contrast, “[d]espite its limitations, currently available *user-based* software suggests that a reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material which parents may believe is inappropriate for their children will soon be widely available.” *Id.* at 877.

⁴³ Lawrence Lessig, *What Things Regulate Speech: CDA 2.0 vs. Filtering*, 38 JURIMETRICS J. 629 (1998).

⁴⁴ *Id.* at 632.

⁴⁵ See Volokh, *supra* note 15.

⁴⁶ *Id.* at 148 (quoting *Reno*, 521 U.S. at 874).

⁴⁷ *Id.* at 148-60.

as effective as the CDA's more or less total ban."⁴⁸ Volokh continues, "The pregnant negative in the Court's reasoning is that, had there really been no equally effective alternatives (as in fact there are not), the CDA should have been upheld."⁴⁹

There are a few other areas, lurking in *Reno*, where decision makers have to decide what dignity to accord to those things that pass as "facts." What assumptions, for example, exist about the nature and functioning of the family that inform evaluations of the role of new technology? Since so much of the social concern over the Internet seems to be about the child, and so many of the remedies deal with interactions between that child and his or her family, one would think the empirical grounding for difficult decisions would be abundant, even if not wholly adequate.

There are normative questions such as whether a parent ought to be able to determine that his or her child should watch images that the state considers inappropriate. But there are factual questions that underlie proposals for change. Are filters useful? How do parents influence the viewing habits of children? In *Reno*, Justice Stevens visits, glancingly, the issue of whether Congress can protect children from indecent programming regardless of the desire of their parents. The United States, in its argument, had contended that the First Amendment does not preclude "a blanket prohibition on all 'indecent' and 'patently offensive' messages communicated" to a minor "regardless of parental approval."⁵⁰ The Court demurred, but in doing so, it seemed to raise a new kind of test. It is true, Justice Stevens writes, that protection of children is a "compelling interest" that, in some instances, justifies regulation. But a regulation that potentially overrules parental preferences, or even covers parental speech to children, "imposes an especially heavy burden" on Congress to demonstrate why less restrictive provisions would not be suitable.⁵¹

This "parent-protecting" test and the context in which this debate arises is intriguing. For just as moralistic as Congress (and perhaps the Court) seems to be in terms of limiting the access of children to indecent material, it is similarly concerned about

⁴⁸ *Id.* at 149.

⁴⁹ *Id.* at 157.

⁵⁰ *Reno*, 521 U.S. at 878. A dispute, really a skirmish, within this discussion is whether or not "minor" should include individuals under eighteen or under seventeen years of age.

⁵¹ *Id.* at 879. In dealing with this question, Justice O'Connor concluded that the record did not show that "many E-mail transmissions from an adult to a minor are conversations between family members"; but more important, she finds "no support for the legal proposition that such speech is absolutely immune from regulation." *Id.* at 896. Perhaps both the Court and Justice O'Connor agree that such speech is not "absolutely immune," since the Court holds that such speech might be regulable if Congress were to meet an especially heavy burden. *Id.*

trenching on parent-child relationships. And this conflict drives Congress and the Court to make unfounded, sometimes silly, but almost always sweeping, statements about parents and their relationship to children. The Court cites earlier decisions for the “consistent” principle that “the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.”⁵² This principle rests on the earlier pronouncement (having to do with foreign-language education) that, “[i]t is cardinal with us that the custody, care, and nurture of the child reside *first* in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”⁵³

Having decided that the CDA covers e-mail, Justice Stevens engaged in an elaborate conceit to indicate the constitutional infirmity of the legislation. “[M]any e-mail transmissions from an adult to a minor are conversations between family members,” he says, setting a predicate for their special protection.⁵⁴ Under the CDA, Justice Stevens contends, “a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community found the material ‘indecent’ or ‘patently offensive,’ if the college town’s community thought otherwise.”⁵⁵ To be fair, Justice Stevens’s concern goes beyond e-mail. It seems wrong to him that under the CDA, a parent “could face a lengthy prison term” for “allowing her 17-year-old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate.”⁵⁶

Here again, as with so much in *Reno*, it is a dependence on a specific and possible empty understanding of the facts of the world that virtually controls how the new media technology is judged. The present state is such that the relationship between conclusions and available facts is dismal. Take just the vision of what we mean by “parents,” what relationship there is (much less ought to be) between parents and children, and how, in fact, decisions are made to deploy sites that are considered “indecent” by Congress. To make a decision, Justice Stevens must have a mental picture of how decisions to deploy indecent sites are made so he can tell whether there is a problem serious enough to warrant

⁵² *Id.* at 865 (citation omitted).

⁵³ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1943) (emphasis added) (holding constitutional a statute barring the teaching of German language in public schools).

⁵⁴ *Reno*, 521 U.S. at 865 n.32. *But see Reno*, 521 U.S. at 886-97 (O’Conner, J., dissenting).

⁵⁵ *Id.* at 878.

⁵⁶ *Id.*

congressional intervention, and his examples are somewhat class-biased, to use an old-fashioned term that seems relevant here. The image that must be in the mind of the lawmaker is of the fractured, possibly “dysfunctional” family, what the government in its brief for *Denver Area* described as the condition of “absence, distraction, indifference, inertia, or insufficient information” that besets “innumerable parents” in America.⁵⁷ A view of the family that supports intervention includes the imagined nonparent parent, incapable or unwilling to establish standards, “consenting” not in the active mode of reviewing and approving material, but acquiescing in an environment where the imposition of standards is impossible (for reasons of time, will, or culture).⁵⁸

Another one of the most interesting debates about the Internet concerns the utility of national law given the extraordinarily international and cross-border nature of modern communications, especially in new media. Justice Stevens’s opinion in *Reno* is not centrally about this subject, but there is some passing mention of a possible constitutional test. The issue is nestled in a footnote, ruminating within the Supreme Court decision. Justice Stevens cites an argument made by one of the plaintiffs, the American Library Association, that “[b]ecause so much sexually explicit content originates overseas,” the Association argued, “the CDA cannot be ‘effective.’”⁵⁹ as that term is precisely used in American jurisprudence. Justice Stevens fends off the argument, saying that it “raises difficult issues regarding the intended, as well as the permissible scope of, extraterritorial application of the CDA.”⁶⁰ This is the Court’s first careful encounter with an issue widely anticipated in legal literature on the Internet.⁶¹ Because the Act could be condemned

⁵⁷ Respondent’s Brief at 37, *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727 (1996) (Nos. 95-124, 95-227).

⁵⁸ Implicit is the problem, addressed in *Butler v. Michigan*, 352 U.S. 380 (1957), of assuring sufficient adult access to speech while also protecting children. How does one tell what the profile of impact is of a congressional proscription—whether it depletes speech available to adults while protecting children? Of course, every congressional proscription or even channeling must have that impact; what constitutes too much, what constitutes adequate alternative availability of information is a matter that has never been adequately addressed by the Court, nor has it been clear what factual bases should underlie a conclusion. See *id.* (finding that Michigan Penal Code section providing that selling to a police officer a book found to have a potential effect of corrupting the morals of a youth violates the Due Process Clause).

⁵⁹ *Reno*, 521 U.S. at 878 n.45.

⁶⁰ *Id.*

⁶¹ See, e.g., David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367 (1996). Johnson and Post state:

While these electronic communications play havoc with geographic boundaries, a new boundary, made up of the screens and passwords that separate the virtual

on other grounds, the Court suggests, it does not have to deal with it.

Still, there is much within these few words worthy of comment. Let us assume that "so much sexually explicit content originates overseas."⁶² It is unclear, from this terse discussion, what it is in the foreign origin of some pornographic material that can limit Congress's capacity to devise a set of satisfactory statutory prohibitions for indecent programming that originates in the United States. Justice Stevens suggests that, perhaps the CDA was not intended to apply extraterritorially, though it is highly likely that almost every prohibited set of images or digits passes through a domestic telecommunications facility.⁶³ Much more interesting is the question of "effectiveness." A law is not "effective" if it can only be enforced against domestic violators *and* much of the damage, unremediated, will be caused by those seemingly beyond the law's reach. And here, the argument seems to be that these "overseas" violators are incapable of being prosecuted because of the special nature of Internet technology. Even if Congress had the power to enact legislation that is extraterritorial in its reach, technology and practicalities would render such a law ineffective. In a world of incapacity to stop one source of illegal conduct, focusing on another might be discriminatory and therefore unconstitutional.

It is clear why the American Library Association would make this argument. Its members are among the possible available defendants to be singled out, though they are small instruments in a world in which the massive "real" wrongdoers are "overseas" entrepreneurs, clever commercial pornographers, largely beyond the nation's enforcement capacity. The Association has been at the forefront of efforts to fight local regulation of Internet speech, both as a matter of principle and because, in an irony of the "post-

world from the "real world" of atoms, emerges. This new boundary defines a distinct Cyberspace that needs and can create its own law and legal institutions. Territorially based law-makers and law-enforcers find this new environment deeply threatening.

Id.

⁶² Even the term "overseas" has a certain charm as an anachronistic way of conceiving the relationship between space and jurisdiction.

⁶³ Note that both 47 U.S.C.A. § 223(a) and (d) apply to both "interstate and foreign communications." 47 U.S.C.A. § 223(a), (d) (West Supp. 1991). Justice Stevens also suggested that there might be questions about the "permissible scope" of extraterritorial application of the CDA. *Reno*, 521 U.S. at 878 n.45. Does that mean that Congress could not make it a crime for a company in France to send an obscene book to an American address, that only those parts of a stream of action that touched American soil could be subject to criminal sanctions? See generally Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1 (1996).

Gutenberg" age, public libraries are often the institutions that are sued.⁶⁴

But the argument is extremely suggestive, perhaps disturbing, in its implications for the limits of law in a digital world and in a world of increasing cross-border mobility of capital. Law will tend to be increasingly incapable of perfect enforcement where transactions and performances can so easily be moved "overseas." Here, the laws that are putatively discriminatory because of difficulties of enforcement are disagreeable images, and the argument could well be made that they should not be sanctioned at all. In the future, however, an argument based on inherent discrimination could be far more encompassing, including the disallowance of laws applying to electronic commercial transactions and possibly other areas, for example, aspects of family law, areas where enforcement might be thwarted if activities were moved offshore.

Could it be that U.S. law becomes "impossible," or difficult, to enforce because of the structure of the Internet and the relationship between extraterritorial actors and U.S. users? Certainly that argument is in the air, and it is one product of the facially attractive idea of preserving the Internet as a "regulation-free" zone.⁶⁵ At any rate, it is not hard to image that the result of such incapacity or difficulty would be discriminatory enforcement against "those poor blokes" who, for reasons of lack of imagination, willpower, or other place-related reasons stayed within the power of the state.

How to think about these questions is not yet clear. Making law disappear is one answer, but not necessarily one that seems to have many institutional proponents or broad public support. In November 2000, a French court took issue with the question of practicality of enforcement. It gave Yahoo Inc. three months to find a technological means to prevent Web surfers in France from gaining access to some Web pages on its U.S.-based auction site that featured over 1,200 Nazi-related items. After the deadline,

⁶⁴ See Nadel, *supra* note 37. In an important early case dealing with online censorship in the context of public library access, *Mainstream Loudon v. Board of Trustees*, 24 F. Supp.2d 552 (E.D. Va. 1998), a public library was forced to discontinue its use of restrictive Internet screening software. See generally Julia M. Tedjeske, Note, *Mainstream Loudon and Access to Internet Resources in Public Libraries*, 60 U. PITT. L. REV. 1265 (1999). In another closely watched case, *Kathleen R. v. City of Livermore*, No. A086349, 2001 WL 216719 (Cal. Ct. App. March 6, 2001), <http://www.techlawjournal.com/censor/19990115.htm>, a state court refused to force a public library to abandon its open access policy regarding Internet use.

⁶⁵ See generally Gary W. Glisson, *A Practitioner's Defense of the White Paper*, 75 OR. L. REV. 277 (1996); see also Vikas Arora, Note, *The Communications Decency Act: Congressional Repudiation of the "Right Stuff,"* 34 HARV. J. ON LEGIS. 473 (1997).

Yahoo would be fined \$13,000 for each day it did not comply with the order. Of course, unlike the invisible pornographic providers, Yahoo had a French office and, also, could be easily located for litigation purposes in the United States.

Taxation, copyright, and defamation law are all areas where, if care is not taken, discrimination may be the consequence of patterns of capacity of law enforcement. There will be suggestions that certain prohibitions that have been taken for granted within a society are no longer available. More likely, it may mean that a different form of extraterritorial as well as domestic enforcement pattern must be devised.⁶⁶ What it certainly means is that, as Justice Stevens indicated, these are "difficult issues" indeed, and may sometime come, in a ripe manner, before the Court.

III. BROADCASTING, RADIO, AND FILM REGULATION V. INTERNET REGULATION

I have sought in this Article to identify several areas where, using *Reno* as an example, new media technology is evaluated according to its relationship to existing constitutional standards. The *Reno* case is part of the Supreme Court's ongoing debate over the qualities in film, traditional television and radio broadcasting, cable, and the Internet that render their regulation subject to different degrees or kinds of constitutional scrutiny. In this last section, I want to examine another facet of the decision: the way the Court, as revisionist historian, uses its evaluation of new media technologies to replay and reorganize its justifications for the treatment of the technology's predecessors. All government agents are, to some extent, revisionists as they try to understand the power of the new in the context of the old. How the Court engages in revision helps us understand what it is about technology that is emerging as significant—from this constitutional perspective.

For example, in *Reno* Justice Stevens asserts a novel reading of past doctrine, namely, that the "history of extensive government regulation of the broadcast medium"⁶⁷ serves, itself, as a "special justification" for treating one technology (broadcasters) in

⁶⁶ Does it mean, for example, that even though transmission or display of "obscene" material might ordinarily be prosecuted under the CDA, even after the Court's decision, the necessarily discriminatory aspect of such a prosecution (given the putative invulnerability of massive foreign purveyors) would be a defense? Cf. Lawrence Lessig, *Zones of Cyberspace*, 48 STAN. L. REV. 1403 (1996). Invoking Coase, Lessig argues that "[a] regulation need not be absolutely effective to be sufficiently effective. It need not raise the cost of the prohibited activity to infinity in order to reduce the level of that activity quite substantially." *Id.* at 1405.

⁶⁷ *Reno*, 521 U.S. at 845.

restrictive ways not applicable to other speakers. In his discussion he cited, *Red Lion Broadcasting Co. v. FCC*,⁶⁸ a case that is so out of fashion that it had gone virtually unmentioned by the Court for years. Another precedent, *Turner Broadcasting, Inc. v. FCC*,⁶⁹ is cited for the novel observation that scarcity of available frequencies, where such scarcity existed for an information technology “at its inception,”⁷⁰ is a further justification for lower scrutiny of broadcasting regulation. Justice Stevens also renews a somewhat controversial ground for justifying regulation and distinguishing broadcasting from other media, namely its “invasive” nature.⁷¹

What is interesting about Justice Stevens’s citation of *Red Lion* is the subtle shift in the meaning that is implied. The previous standard understanding of *Red Lion* had been that broadcasting was more readily subject to regulation because scarcity of available frequencies made some form of rationing necessary and that necessity allowed the imposition of public interest standards. Because it is supposed that it is impossible for everyone who so wishes to get on the airwaves, government has to pick and choose. Almost from the beginning this reading of the First Amendment, this prong of *Red Lion*, endured attack.⁷² Economists argue that any scarcity shortage is government-imposed, in that it was always possible to allocate more spectrum to broadcasting and technically possible to make spectrum accommodate more voices. This argument gained emotive power when cable television and other technologies made channels plentiful. In a world of abundance, there seems no reason to pitch constitutional reasoning on a scarcity that, according to some

⁶⁸ 369 U.S. 367 (1969). For a thorough and useful history and discussion of *Red Lion*, see CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 49 (1993) (arguing that the scarcity rationale in *Red Lion* is based on the need to ensure “broad diversity of views”).

⁶⁹ 512 U.S. 622 (1994) [hereinafter *Turner I*]. The citation of *Turner I* is unusual. *Turner I*, after all, recites the history of regulatory distinctions only to hold that hierarchies of constitutional concern do not encompass both broadcasting and cable television. *Turner I* was primarily about the weaknesses of congressional lawmaking. *Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180 (1997) [hereinafter *Turner II*], specifically rejected *Red Lion*’s application of spectrum-scarcity as a ground for regulation in favor of some new “bottleneck” theory of regulation.

⁷⁰ *Reno*, 521 U.S. at 845 (emphasis added).

⁷¹ See *Sable Comm., Inc. v. FCC*, 492 U.S. 115 (1989) (prohibiting provider of sexually oriented prerecorded telephone messages from participating in obscene interstate telephone communications for commercial purposes but enjoining statutory enforcement applying to indecent messages).

⁷² See Monroe E. Price & John F. Duffy, *Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court*, 97 COLUM. L. REV. 976 (1997); see also Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905 (1997).

versions, simply does not exist.

Over the years, the Court, itself contested its *Red Lion*-based justification in a variety of cases suggesting that subsequent information and emerging technology might one day require abandonment of the doctrine. Its survival hung by a hair (or a vote or two). Now, however, after *Reno*, the justification may have changed. Now *Red Lion* seems to stand for the proposition that the status of broadcasting as a more regulable medium is historically contingent, rather than solely technologically based. A medium that has had significant attention from the government from the outset will be treated differently from one that has not. Since most media technologies have close relationships to government in their development—and the Internet is certainly no exception—this reading of judicial history is important.

The Court could be saying that traditional television and radio broadcasting meet three conditions, each of which is necessary for its peculiar susceptibility to regulation. These are: its history of extensive government regulation, the spectrum scarcity at its founding, and its special quality of invasiveness. A medium that does not have all of these qualities cannot be successfully compared with broadcasting so as to determine the category of constitutional analysis in which it fits. On the other hand, the Court could be arguing that these are relevant factors, not an ensemble of required conditions. Invasiveness alone, a history of extensive regulation, early shortages of frequencies, or their equivalents alone (or some combination of them) in this reading would be sufficient to justify a lower threshold for congressional regulation. The relevance of these factors to the Internet and to Justice Stevens's analysis in *Reno* therefore bears further analysis.

Justice Stevens recreates the jurisprudence of the broadcasting cases precisely so as to differentiate the historical electronic media from this new form of using wires and ether. His very explanation of cyberspace consists of facts designed to fit into a reinterpretation of the constitutional basis for regulation in broadcasting. The qualities of broadcasting that permit greater regulation, according to Justice Stevens, "are not present in cyberspace."⁷³

But is Justice Stevens correct, not in terms of his retrospective interpretation of the broadcasting cases, but in terms of the way he differentiates broadcasting from cyberspace? The first area for differentiation is "history." Justice Stevens makes the claim that broadcasting had a history of extensive regulation while the "vast

⁷³ *Reno*, 521 U.S. at 868.

democratic forums” of the Internet has not been subject to similar government supervision and regulation.⁷⁴ In one sense, of course, this is a false statement. The Internet, as the Court’s decision traces, has a history rooted in federal supervision and largesse. It is an outgrowth of what began in 1969 as a military program to enable computers operated by the military defense contractors and universities conducting defense-related research to communicate with one another by redundant channels. The Advance Research Project Association Network (“ARPANET”) is much more firmly rooted in a history of government involvement than were the early days of spectrum usage when radio broadcasting was relatively wild and open.⁷⁵

Besides, the relationship between the Internet and Congress can be likened to the relationship between radio and the federal government at the time of the Radio Conference that led to the 1927 Act. In the early days of radio, as in the 1990s with the Internet, there was dynamism, ingenuity, and a period of unregulated innovation. With radio, explosive growth led to concern (though on different issues), federal study, and eventually legislation. Despite Justice Stevens’s apparent desire, history cannot begin when the historian wants it to. What has become the Internet originated with the Pentagon and involved an almost exclusively federally authorized network. Also, it is hard to understand how one characterizes a medium by its history when it is the very nature of that history that is being fashioned.⁷⁶

We also know, now that we have *Reno*, that the Internet is not invasive. Why? Because the district court told us so, and the Supreme Court accepts that finding. Justice Stevens concludes, “the risk of encountering indecent material by accident is remote.”⁷⁷ This is, as is said, a “constitutional fact.”⁷⁸ Perhaps a constitutional fact is different from a garden-variety fact. To conclude, as Stevens does, that the Internet is distinguishable from broadcasting with respect to invasiveness, is a complicated matter.

⁷⁴ *Id.*

⁷⁵ True, it was ARPANET, not the vast democratic fora of the Internet, that was so regulated, but in some respects it is the same medium. *Cf. Hazlett, supra* note 72, at 908.

⁷⁶ There is something here of Bollinger’s interesting, but never fully judicially embraced, theory that it was possible to regulate some parts of the media so long as there was at least one unregulated one, like newspapers or the Internet. *See* Lee C. Bollinger, Jr., *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1 (1976).

⁷⁷ *Reno*, 521 U.S. at 867.

⁷⁸ *See* Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993 (1986); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985).

"Unlike communications received by radio or television," Justice Stevens writes, "'the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read to retrieve material and thereby to use the Internet unattended.'" ⁷⁹

First meaningfully formulated in the dial-a-porn case *Sable Communications of California, Inc. v. FCC*, the notion of "affirmative steps" represents a patina on "invasiveness." Affirmative steps certainly enable a more accurate analysis of the emerging "interactive media model" in U.S. telecommunications, in which most content will be accessed rather than broadcast, pulled rather than pushed.⁸⁰ Yet even for current Internet technology, there are problems with this innovative approach. It is true, for example, that, at least the first time, a child has to do more in a more directed and deliberate way, than turn the dial to get access to some particularly outrageous or erotic material. But once the place is saved, or "bookmarked," there is very little functional difference between turning a dial and gaining access to a website.

Odder still is the supposed distinction between those children with some "ability to read" and those without the ability. Invasiveness and uninvitedness may have to do with a child's sophistication, but in no previous case did this issue turn on actual literacy or its absence. Who are we talking about: the seventeen-year-old deemed to be a computer wizard, or the five-year-old who stumbles onto the satiric-erotic false-Disney program? How does the society make this decision? Can it? Are these questions about which we do not know the answer or is the district court finding in this case sufficient, even against a congressional finding to the contrary? Where does Justice Stevens arrive at his factual understanding of a world that is interacting with the computer and how that world differs from or is similar to the world that interacts with radio and television? For constitutional analysis to be careful, we must know how contingent doctrine is on factual understandings and what constitutes adequate information supporting a notion of invasiveness or to the contrary.⁸¹

⁷⁹ *Reno*, 521 U.S. at 854 (citing finding 89 of the District Court decision in *ACLU v. Reno*, 929 F. Supp. 824, 845 (E.D. Pa. 1996)).

⁸⁰ For an early First Amendment analysis of this model, see Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619 (1995).

⁸¹ In *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727 (1996), Justice Breyer relied on only a few books and articles to conclude that cable television was invasive in the *Pacifica* sense. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978) (asserting that the broadcast media is invasive because of its "pervasive presence in the

The third and most convincing difference between broadcasting and Internet questions whether spectrum scarcity exists. It is now almost an article of faith that whatever scarcity existed in the bad old days of analog spectrum no longer exists. In *Reno*, Justice Stevens puts a new and unexamined spin on the question, asking, for the first time in the Court's treatment of this subject, whether the Internet is a "'scarce' expressive commodity."⁸² He seemed to be inviting a refocus from an older, economic analysis of spectrum availability to a broader focus on the element of "expressiveness." Justice Stevens reveled in the Internet's plenty: "It provides relatively unlimited, low-cost capacity for communication of all kinds. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox."⁸³ All the magic elements are there: pamphleteer, town crier, and soapbox. No wonder this is Justice Stevens's clinching point before concluding that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."⁸⁴

Yet there are some factors to consider. We are at a stage in the development of the Internet—perhaps like early radio—where entry is certainly easy, inexpensive, and nondiscriminatory. But, as with radio, it was later developments in industrial organization and government action that made entry more difficult and a broadly democratic means of becoming a town crier, almost impossible. Radio spectrum was not really "scarce," though radio spectrum as an "expressive commodity" may have been. It would be wonderful if the Internet were to retain its capacity for expressiveness, as nonscarce as it seems currently to be, but we do not know yet whether that will be the case or whether the Court's limitations on congressional action will expand or restrict that zone. Certainly, the history of radio would have been different if the Court had held the earliest forays into regulation and licensing unconstitutional because of the heady, egalitarian patterns of entry that characterized the time of basement radio transmission and ease of speaker entry.

The Court's decision also raises interesting questions about which numbers—what kinds of abundance—are relevant to the issue of scarcity, or scarcity of "an expressive commodity," to

lives of Americans" and because "it is uniquely accessible" to children). Compare the role of the district court's fact findings in *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996).

⁸² *Reno*, 521 U.S. at 870.

⁸³ *Id.*

⁸⁴ *Id.*

repeat again Justice Stevens's novel and stunning phrase.⁸⁵ There are millions of radio receivers just as there are millions of computers. Penetration is obviously not the same, but moving in the same direction of universality. The important point for Justice Stevens, however, is that computers, unlike radios, are interactive. What is being compared is access or entry by *speakers*, not *receivers*. The end of scarcity with respect to "expressiveness" comes precisely because of the radical transformation of access to convey or impart as opposed to receive information.

Here the Court is committing to a particular conception of the Internet. Justice Stevens is assuming that the number of subscribers to the Internet is equivalent to the number of speakers, i.e., like the telephone, and that subscribing is a mark of entry as speaker. At the moment, that may be a valid assumption. But the structure and custom of usage of the Internet could change. The behavior in the future might be that, other than for an e-mail function, ninety-nine percent of subscribers act like passive receivers or dial turners: selectors at best but never, otherwise, as communicators. Information may come in packaged channels, with a market structure dominated by three or four giants. Then the question might be whether bottlenecks to entry exist, and whether analysis of the Internet (in terms of congressional power) should be assimilated to cases that justified regulation not on spectrum scarcity, but on the difficulty of access by those who program channels and distribute them over cable.⁸⁶

In one respect, this hypothetical future of packaged channels and a market dominated by oligopolistic producers has already come into existence, and the implications for "scarcity" have already begun to take shape. The abundance of the Internet has produced a new form of scarcity, one described by Jack Balkin:

All communications media produce too much information. So in that sense, all media have a problem of scarcity. But the scarcity is not a scarcity of bandwidth. It is a scarcity of audience. There is only so much time for individuals to assimilate information. And not only is there too much information, some of it is positively undesirable. As a result, all media give rise to filtering by their audience, or, more importantly, by people to whom the audience delegates the task

⁸⁵ *Id.* This is interesting because of the history of the "scarcity" rationale and its tie to limitations on spectrum. This was thought to be a physical limitation, as compared to shortages of printing presses or limitations on the number of newspaper dailies in a market that could survive, both of which were considered economic. By shifting the phrase from spectrum scarcity to scarcity of an expressive commodity, Justice Stevens might be opening the way for a reconsideration of this long-held distinction.

⁸⁶ See *Turner II*, 520 U.S. 180 (1997).

of filtering.⁸⁷

Information overproduction creates a problem not merely of unwanted offensiveness greeting an Internet user, but also of unwanted irrelevance. Portals to the Internet, such as Yahoo or Excite, exist to remedy this problem. Their home pages form some of the most expensive “real estate” in cyberspace. These portals provide free search engine technology to aid the user in finding desired websites. They also advertise websites. If a website is not listed by these search engines, it effectively does not exist. The search portals have become the dominant brokers in the “expressive commodity” of the Internet.⁸⁸

Justice Stevens, in *Reno*, reopens questions of definition, exploring considerations that make one information technology more sensitive than another, more susceptible to regulation. He identifies history, scarcity, and invasiveness as criteria for decision. But his treatment of broadcasting and the Internet are not necessarily convincing, even as his own grid of analysis is applied. This is not surprising. “We are not the first generation,” as Carolyn Marvin has written, “to wonder at the rapid and extraordinary shifts in the dimension of the world and the human relationships it contains as a result of new forms of communication, or be surprised by the changes those shifts occasion in the regular pattern of our lives.”⁸⁹

Technology has the potential to alter every institution, to provide even more access to education, to jobs, and to opportunities.⁹⁰ But things are new from a particular perspective. A new technology may be one that replaces or substantially augments a predecessor or establishes difference of a kind that must cross a hurdle of significance. We might reserve the notion

⁸⁷ J.M. Balkin, *Media Filters, the V-chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131 (1996).

⁸⁸ The idea that scarcity no longer exists because of the Internet and various other technologies of abundance has been challenged by other comparative analysts of media law and policy. See Stefaan Verhulst, *About Scarcities and Intermediaries: The Regulatory Paradigm Shift of Digital Content Reviewed*, in NEW MEDIA HANDBOOK (Leah Lievrouw & Sonia Livingstone eds., forthcoming 2001). Verhulst proposes that the very abundance of content has caused a need for new intermediaries that can navigate, contextualize, filter, decode, customize, and authenticate the information and its source for the user. He states, a “phenomenon of re-intermediation is emerging, [that] in many ways creates new (artificial) scarcities.” *Id.* at 32.

⁸⁹ CAROLYN MARVIN, WHEN OLD TECHNOLOGIES WERE NEW: THINKING ABOUT ELECTRIC COMMUNICATIONS IN THE LATE NINETEENTH CENTURY 3 (1988); see also TECHNOLOGICAL REVOLUTIONS IN EUROPE: HISTORICAL PERSPECTIVES (Maxine Berg & Kristine Bruland eds., 1998).

⁹⁰ See, e.g., GEORGE GILDER, TELECOSM: HOW INFINITE BANDWIDTH WILL REVOLUTIONIZE OUR WORLD (2000); JOEL KOTKIN, THE NEW GEOGRAPHY: HOW THE DIGITAL REVOLUTION IS RESHAPING THE AMERICAN LANDSCAPE (2000).

of newness for innovations that have major significance for cultural developments, the distribution of power in society, the organization of the polity, or the recognition of new consumer markets.⁹¹ Altered flows of information, resulting from new technologies, change in almost every case the balances that previously existed in a legal framework.⁹²

The point of this Article, as I noted at the outset, is not to take sides in the grueling debate over whether new information technologies are truly revolutionary.⁹³ Anthony Smith established a fairly elevated test for the “newness” of new technology: “An age in which a new transforming technology is taking hold must, almost self-evidently, express its most profound social, economic, and political changes in terms of that technology—so closely and completely that historians try, but fail, to disentangle the resulting skeins of cause and effect.”⁹⁴ The task, rather, has been to ask how these transformations interact with the processes of law-making and adjudication. As electronic technologies capture our time, our lives, our imagination, they socially and culturally overwhelm our older modes of thinking about the legal regulation of data, speech, imagery. As Ethan Katsh has noted, the new technologies create “shifts in the value of information, in the language used to describe information, in customs used to employ information, in expectations about how information will be used, and in norms that are applied to information and communication.”⁹⁵ Katsh likens technology changes to changes in fundamental tools and hastens to indicate how significant such transitions might be. “The new media enable us to expand in rather extraordinary ways our capabilities for processing, storing, organizing, representing, and communicating information.”⁹⁶ In the early period of the technology’s use, the prevailing attitude might be that all that is occurring is the development of new methods, techniques to do existing tasks more efficiently. But in certain circumstances, tools become virtually autonomous engines for change. Like the

⁹¹ For a study of the scope of newness of the printing press, see ELIZABETH EISENSTEIN, *THE PRINTING REVOLUTION IN EARLY MODERN EUROPE* (1993). The Rand Corporation established a project, partly based on Eisenstein’s model of change, to look at parallels between the coming of the Internet and the coming of the printing press. See *New Paradigms and Parallels: The Printing Press and the Internet*, at <http://www.rand.org/parallels/> (Oct. 2000).

⁹² See M. Ethan Katsh, *Cybertime, Cyberspace, and Cyberlaw*, J. ONLINE L. (1995), at <http://warthog.cc.wm.edu/law/publications/jol/Katsh.html> (last visited Jan. 15, 2001).

⁹³ See, e.g., GILDER, *supra* note 90; KOTKIN, *supra* note 90.

⁹⁴ ANTHONY SMITH, *FROM BOOKS TO BYTES* 3 (1993).

⁹⁵ M. Ethan Katsh, *Law Reviews and the Migration to Cyberspace*, 29 AKRON L. REV. 115, 120 (1996).

⁹⁶ *Id.* at 120.

process-changing harmonium in Hardy's modest village church, "a plow may compel its users to arrange their agricultural activity, and perhaps also other parts of their lives, in a way that conforms to its own logic" in ways neither intended nor foreseen by those who originally devised the innovation.⁹⁷

Law moves more slowly than its external impacts and not always or immediately in parallel with them. The development of law is imprisoned in the rhetoric of its prior existence. That is the weakness, certainly of courts, but of legislatures as well. Altered flows of information, resulting from new technologies, change the balances that previously existed in a legal framework. But it is hard to know when those changes undo the preexisting formulaic approaches to a task. *Reno* is an example of striving to move outside of existing formulae, but still being bound by them, of pushing at categorical boundaries, but functioning within the boundaries themselves. Throughout the law, this process of adjustment takes place. Disputes over the power and effect of images on children are no different. Something is changing, changing markedly (as has always been the case) in the interaction between the staggering symbolic output of the society and the development of its children. Courts and legislatures try to mediate this interaction, as happened in the CDA, its descendants and the court opinions (like *Reno*) interpreting and evaluating them. In the flood of novelty captured by the new technology, it is difficult to determine what attributes of change yield revolutionary consequences and what attributes merely expedite distribution. Newness is a quality that fits uneasily with law.

⁹⁷ PETER L. BERGER, *THE SACRED CANOPY* 9 (1969).

38 Stan. J. Int'l L. 109

Stanford Journal of International Law
Winter 2002

Symposium: Expressive Rights in the Information Age
Articles

BEYOND DE FACTO FREEDOM: DIGITAL TRANSFORMATION OF FREE SPEECH THEORY IN JAPAN

Itsuko Yamaguchi^{a1}

Copyright (c) 2002 Board of Trustees of the Leland Stanford Junior University; Itsuko Yamaguchi

I. Introduction: Why de facto?

Will the advent of the digital communications media, best exemplified by the broadband Internet, affect freedom of expression in Japan?¹ The answer, obviously, is yes, it already does. What is less obvious is how. As is often said in Japan, as in the United States, the Internet has reduced the barriers of entry to the mass speech market and empowered individuals who have only limited resources to engage in global communications. The Internet brings the benefits of diversity of information, ideas, values, and ways of life-- diversity for which the Japanese public has long hoped, but rarely found, in domestic, established mass media. Yet it became apparent by the mid-1990s that the Internet also enables distribution of illegal and harmful materials on an unprecedented scale. The Japanese government faced a policy choice in dealing with illegal content such as obscene and defamatory materials distributed via the Internet and other digital network communications. Japan could have passed a new law specifically targeted for cyberspace or could have applied existing media and communications laws to cyberspace. The Japanese government preferred to avoid immediate legislation, which would have risked stifling the development of digital communications. Instead, rulemaking for cyberspace in Japan gradually took place in its courts through the application of existing laws to resolve individual cases.

^{*110} This approach, however, generated uncertainty. Japan's existing regulatory scheme of a trifurcated communications structure did not fit well with the nature and structure of cyberspace. Internet service providers (ISPs), who had statutory obligations under Japan's existing laws to protect privacy in communications and to refrain from censorship, were left unsure if they could remove problematic communications from their service. Such uncertainty, and the relatively high degree of anonymity in cyberspace, encouraged harmful expressive activities. The "wait-and-see" approach, and the limited control of Japan's laws and regulations over the global flow of information, fostered an immense domain of unregulated expressive freedoms in cyberspace. The Internet and other digital communications expanded de facto freedom of expression to an extent that postwar Japanese society had never experienced. Japan has been taking legislative measures to deal with illegal and harmful online materials since the late 1990s, and this unregulated domain has been gradually cut back.

To understand the Japanese speech regime it is useful to distinguish its de jure and de facto status. The recently expanded freedom to distribute illegal materials in cyberspace can be described as de facto in the sense that such materials should be regulated, but have not been because of Japan's hesitant policy. In other words, Japan's currently expanded freedom of expression on the Internet and other digital networks is only de facto, because that freedom will be diminished when Japan completes the enactment of legislative measures to demarcate the de jure limits of free speech in cyberspace.

By describing the recently expanded freedom as de facto, it becomes clear that the Internet is changing not only the practice of Japanese freedom of expression, but also its theory. Free speech theory seeks philosophical justifications for the protection of speech and explains its underlying values. In the United States free speech theory reemerged in the 1980s in the wake of judicial broadening of the First Amendment in the 1960s and 1970s. There is an interesting comparison to be made between U.S. and Japanese free speech theories. Following uncertainty and disagreement over free speech on the Internet, there is now heightened attention in Japan to the justifications and underlying values of protecting speech. In Japan, the reemergence of free speech theory was not stimulated by judicial broadening of constitutional protection, but by the de facto expansion of

freedom of expression, in part due to the Internet.

In this Article, I will first explain how difficulties in incorporating cyberspace into Japan's existing legal structure generated uncertainty and bred illegal and harmful online speech in Japan. Second, I will analyze the constant tensions caused by the persistent pro-speech forces within postwar Japanese society that both discourage governmental efforts to regulate speech and explain the recent expansion of online speech as well. Last, I will note how temporarily expanded de facto free speech on the Internet is changing Japan's hesitation to regulate speech via legislation and is thus transforming Japanese free speech theory.

***111 II. Uncertain Free Speech in Cyberspace**

Though I use the term de facto in order to highlight the temporal nature of free speech expansion on the Internet, the expansion does involve a constitutional concern. Freedom of expression in cyberspace is protected by Japan's postwar Constitution, Nihonkoku Kenpo, promulgated in 1946. Article 21, stating that "[f]reedom of assembly and association as well as speech, press and all other forms of expression are guaranteed,"² can cover any newly emerged medium. However, regulation of expressive freedoms can be justified under the "public welfare" clause of the Constitution that generally marks the limits of fundamental human rights.³ The issue during the early days of the Internet and other related communications, such as e-mail and bulletin board services, was whether cyberspace could be subjected to real world regulation. But the focus of discussion in the 1990s shifted to how to regulate cyberspace.

As mentioned previously, the Japanese government did not rush to regulate illegal materials in cyberspace. Japan preferred to use its existing legal structure, even though it was unclear how cyberspace should be integrated into the regulatory rubric of the existing media.

In Japan, as in the United States, media law and regulation is organized under a trifurcated communications system consisting of print, broadcasting, and common carriage.⁴ Freedom of expression is most strongly guaranteed in the print model. Content-based regulation of print media is not constitutionally permissible. Only a law of general applicability may govern the realm of print media. In contrast, constitutional guarantees of free speech are most compromised in the broadcasting model. The broadcasting media is subject to a licensing system and extensive content-based regulations. The common carriage model is characterized by regulations to ensure universal access and privacy. Japan's judiciary did not make clear which model incorporated cyberspace. However, the Japanese courts gradually showed that existing laws of general application, such as the obscenity provision of the Criminal Law and the defamation provision in the Civil Law, could be applied in cyberspace. The courts often interpreted existing laws flexibly so that the law could be applied to illegal materials on the Internet and other digital networks.

For example, Article 175 of the Criminal Law,⁵ Japan's obscenity provision, provides that those who distribute, sell, publicly display, or possess for the purpose of sale, obscene writing, pictures, or other materials, shall be fined or imprisoned. The term "obscene material" was traditionally interpreted to mean a physical object. Lawyers and criminal law scholars have suggested that applying Article 175 to intangible data in cyberspace could be a violation of Article 31 of the Constitution, the due process provision.⁶ In Japan's first cyber-pornography case in 1996, a district court applied Article 175 and *112 convicted the defendant who posted obscene pictures on an Internet website.⁷ A Supreme Court decision in 2001 put an end to lingering constitutional doubts by holding that the hard disk of a host computer in which the defendant had stored obscene pictures was the "obscene material."⁸

The difficulty in incorporating cyberspace into Japan's existing law is also revealed in civil defamation cases, particularly on the issue of ISP liability. In Japan, Article 4 of the Telecommunications Business Law requires that a telecommunications business operator protect the "secrecy of communications."⁹ The secrecy requirement is designed to serve not only privacy but also free speech. The statutory requirement derives from the second paragraph of Article 21 of the Constitution, which provides that "[n]o censorship shall be maintained, nor shall the secrecy of any means of communication be violated."¹⁰ The underlying idea is that communications such as the mail are a form of expression, and prohibition of governmental intrusion in the realm of private communications will promote free political speech. This notion stems from the reaction to Japan's notorious wartime history of monitoring and censoring letters and writings of political dissidents such as communists and anti-Emperor groups. The scope of the secrecy requirement is broad. In the postal context the High Court ruled in 1966 that "secrecy," guaranteed under Article 9 of the Postal Law, includes the address and name of a letter's sender and recipient as well as its content.¹¹

In the early to mid-1990s, ISPs who operated under the Telecommunications Business Law were unsure of their statutory obligations. The secrecy requirement arguably obliged ISPs to act as mere passive conduits, like telephone operators, not

monitoring the content of communications. It also suggested that ISPs are not authorized to disclose information about the senders of problematic messages to their victims. This created a formidable barrier to legal remedies for those victims that wanted to bring civil lawsuits. In criminal cases, courts could order the ISP to disclose information about the sender. Japan's existing civil law, however, did not have this disclosure procedure.¹² It was not easy for a victim to identify an anonymous sender without the ISP's help, and a victim cannot commence a civil action for ^{*113} damages without identifying a defendant.¹³ Therefore, the anonymity provided by the Internet, coupled with the uncertain scope of Japan's existing statutory "secrecy" requirements in the context of communications in cyberspace, encouraged illegal and harmful expressive activities online.

To complicate matters further, it was not clear under the existing law whether the ISP could remove problematic messages or not, even after the ISP received warnings of its content from an alleged victim. There were reasons that the ISP would hesitate to remove these messages. First, if the ISP removed a problematic message, its sender might file suit against the ISP for breaching its contractual duty to provide online service. Second, the sender might claim that removal of his message constituted defamation by the ISP against the sender. Third, ISPs feared that the act of removal might be regarded as a violation of Article 3 of the Telecommunications Business Law, which prohibits "censorship."¹⁴ Japan didn't have a "Good Samaritan" provision for ISPs, like the one enacted in the United States in 1996. Such laws are meant to encourage ISPs to regulate the dissemination of offensive materials on their services by immunizing the ISP or barring lawsuits seeking to hold the ISP liable for editorial functions such as removing messages.¹⁵

The uncertain legal obligations of ISPs were examined in Japan's first online defamation lawsuit, the so-called "Nifty case." The suit was brought in the Tokyo District Court in 1994 against three respondents: a sender who posted allegedly defamatory messages in an online discussion forum, the system operator who moderated the forum, and the telecommunications operator which provided the service. The court in 1997 held all three respondents liable and it awarded damages to the petitioner.¹⁶ The court clarified the legal obligation of the system operator and the company, which later became the general liability standard for ISPs in Japan.¹⁷ The court refused to assign ISPs the "heavy obligation" of constantly monitoring content ^{*114} or actively searching for problematic transmissions. However, the court held that the ISP is "obliged to take necessary action," such as removing posted defamatory messages of which it has specific knowledge.¹⁸

Even after Nifty, problems continued in the application of existing law to cyberspace communications. For example, under the Nifty standard, once the ISP was notified of a problematic message, it had the difficult burden of deciding whether the message was actually defamatory. Furthermore, the risk of lawsuits brought by senders of removed messages remained. In 2001, the Japanese Diet passed a bill to clarify ISP obligations. Under the law, an ISP would be liable only when it knew or has "considerable reason" to know that a communication infringes on another person's rights, and when it is "technically feasible" for the ISP to prevent the transmission. Second, an ISP would not be liable to a sender whose message was removed if the ISP had "considerable reason" to believe that the sent or posted information infringed on another's rights, or if the ISP did not receive an objection from the sender to such a preventive measure within seven days of receiving notice of the impending measure from the ISP. Third, the law gives an alleged victim of an infringing communication the right to demand that the ISP disclose identification information about its sender.¹⁹ The law was promulgated on November 30, 2001, and it will come into effect within six months.

III. What Lies Beneath

Why did the Japanese government wait so long to take seemingly necessary legislative measures against illegal online speech? The Japanese government had closely reviewed related laws of other nations but was very slow to implement its own. There are several possible explanations for this hesitation. To be sure, generally speaking, Japan's legislative process is slow. But another likely reason for the hesitation is that within Japanese society there exists consistent skepticism about any governmental effort, particularly legislative measures, to limit freedom of expression. That skepticism is typically displayed by only a segment of the Japanese public, media, and academia, but it is also shared among a portion of those in government. They fear that any seemingly benign or narrow law might end up causing wider and unforeseen restrictions on expressive activities. The fear is based on Japan's experiences before and during World War II, when the government enacted laws legitimizing the suppression of speech.

No society can take a completely hands-off approach to free expression; Japan is no exception. As mentioned, there are persistent pro-speech forces within Japanese society that generate constant tensions over speech regulation. Perceived efforts to limit free expression, including the amendment of existing ^{*115} laws, have been met with alarm and been confronted with "slippery slope" arguments. Therefore, when a new speech-related legal problem emerges, the Japanese government tends to

deal with it by stretching the interpretation of existing laws instead of making new ones--hence Japan's hesitation to enact legislation regulating speech in cyberspace in the mid-1990s.

Japanese courts have often justified the stretched application of existing laws. The Supreme Court decision sustaining the constitutionality of applying the existing criminal obscenity statute to obscene materials distributed over the Internet is only the most recent example.²⁰ In the past the Supreme Court has approved content-neutral regulation of political material on signboards under a local ordinance²¹ and has sustained tight election campaign regulations under the Public Office Election Law.²² The scope of pre-war criminal and civil defamation and libel provisions was significantly narrowed by postwar immunity statutes and case law,²³ but those procedural safeguards do not work as drastically as the "actual malice" standard does in the United States.²⁴ Since the "Lady Chatterley's Lover" case in 1957,²⁵ the Supreme Court has repeatedly used the "public welfare" clause of the postwar Constitution to justify upholding Article 175 of the Criminal Law, a prewar obscenity provision.²⁶

Indeed, although Japan's postwar Constitution expressly authorizes judicial review, there have been only a handful of cases in which the Supreme ^{*116}Court invalidated national legislation, and none were free speech cases.²⁷ Constitutional litigation over legislation is limited in Japan in general. The very small number of national laws invalidated by the Court reflect the characteristics of Japan's elaborate national legislative process.²⁸ Nevertheless, there has been a discernible gap between the more conservative Supreme Court's decision-making and the vigilantly pro speech forces within Japanese society.

Most of Japan's postwar constitutional law scholars have tried to reconcile those pro-speech forces with Japan's deferential courts. Their main strategy from the 1950s through the 1980s was to develop procedural doctrines. They vigorously advocated the adoption of doctrinal tools, mainly from the United States, and tried to introduce a set of rigorous standards of constitutional scrutiny into Japanese free speech jurisprudence. They were careful to select from the liberal elements of U.S. law that protected speech rights.²⁹ Their focus in the 1950s was not the McCarthy era retrenchments but rather the Holmes and Brandeis formulation of the "clear and present danger" test. In the 1960s and afterwards, they looked to the progressive free speech decisions of the Warren and Burger Courts.³⁰

By the mid-1980s, Japanese constitutional law scholarship had developed sophisticated doctrinal devices in the free speech arena,³¹ which the Supreme Court occasionally used in highly abstract ways. But the Court still sometimes justified the continuation of prewar regulations on speech in the name of "public welfare." One of the most prominent and heavily criticized examples is the 1984 judgment upholding the constitutionality of confiscating obscene materials under the guise of customs inspections.³² While the Court admitted that Article 21 of the Constitution was an "absolute prohibition of censorship," the Court skillfully narrowed the scope of "censorship" so as to exclude the inspection of obscene materials conducted by administrative authorities, which it held was part of the customs collection procedure.

Critics have been puzzled by the Court's claim that a customs inspection "does not amount to a prior restraint itself."³³ The Court's reasoning was that ^{*117}the prohibited material, "generally speaking, has been published abroad already" and the restriction on its importation is not a prohibition of publication itself. For the Court, it was "clear" that "the protection of a sexual order and maintenance of a minimum sexual morality" is for the "public welfare." In fact, Article 175 punishes only the distribution, sale, public display, and "possession for the purpose of sale" of obscene material, not its mere possession.³⁴ However, the Court denied the possibility of tolerating importation for the purpose of mere possession, saying that it was "unavoidable" to inhibit importation "at the water's edge." This restriction, regardless of its stated purpose, was needed "to prevent effectively the sound sexual morality in our country from being impaired." In the end, the majority opinion used a narrow construction technique and saved the law from being declared unconstitutional.³⁵

This technique of stretching existing law to limit speech inevitably deepened the suspicions of pro-speech forces within Japanese society towards any government measure to regulate speech. It also led some constitutional law scholars in the late 1980s to reconsider their overwhelming strategic emphasis on procedural doctrines.³⁶ These scholars reexamined the dearth of arguments on behalf of substantive free speech values both in courts and among most academics.

In the United States, various theories provide philosophical justification for the protection of free speech and explain its underlying values. These may be referred to as the "theory,"³⁷ "philosophy,"³⁸ "rationale,"³⁹ or "the Why question"⁴⁰ of free speech. Among the various strands of free speech theory, there are roughly two lines of argument. One emphasizes the affirmative or intrinsic value of speech. For instance, it argues that free speech advances truth, facilitates democratic self-government, and promotes individual autonomy and self-realization. The other, consisting of "negative theories," focuses more on the special reasons to distrust government in the realm of speech regulation.⁴¹ Japanese scholars studied a rich variety of U.S. free speech "theory" and argued that Japan needed to deal with the substantive ^{*118}affirmative value of

speech more directly in order to achieve stronger free speech protection.

In contrast, Japan's attitude of staunch opposition to limitations on speech, especially in the 1950s and 1960s, can be explained by the "negative theories." There was an ideological distrust among liberal and socialist-leaning intellectuals (including mainstream constitutional law scholars) of the more conservative "capitalist regime." This distrust was based on empirical evidence of the government's inability to handle speech regulation before and during World War II. The de-emphasizing of the substantive values behind free speech was perhaps strategically wise in the postwar era. A more traditionally authoritarian value system still lingered in Japanese society and the nation was in the shadow of the Cold War. In addition, certain factual conditions were required before an argument based on the substantive value of speech could have its intended effects on the courts' reasoning.

Without such conditions, the substantive value argument can work against, rather than for, free speech. Indeed, the substantive value argument did not seem to push Supreme Court reasoning in the direction of strong free speech protection even in the 1980s and 1990s. In 1986, the Supreme Court eloquently suggested a democratic self-government theory as the "thought" which "lies at the root of paragraph 1, Article 21 of Constitution," but quickly moved on to justify an injunction against a magazine's publishing defamatory material against a candidate for public office. The Court stated that this material represented "an abuse of freedom of expression."⁴² Similarly, the protective power of the U.S. "marketplace of ideas" theory seemed lost in Japan, when in 1993 and 1997 the Supreme Court actually invoked the theory to justify the Minister of Education's rejection of a petitioner's high school history textbook under the School Education Law.⁴³ The issues before the Court in that case included the role of the government in education as well as free speech. The textbook contained controversial descriptions of the Japanese ^{*119} government's military operations, especially during World War II. There was suspicion that the textbook was rejected at least in part because the Japanese government disfavored its content.⁴⁴ However, the Court emphasized that the rejected textbook could still be published as a book for the general public and that the textbook examination was "not about the prohibition of the entrance itself to the marketplace of ideas."

In both the injunction case and the textbook case, the Japanese Supreme Court superficially used the substantive value argument simply to sustain the limit on freedom of speech, without embracing its original, strong speech-protective function retained in the United States. Japanese free speech theory at that time apparently lacked the conditions to achieve stronger free speech protection in the courts. But now, the rapid expansion of expressive freedoms in Japanese society has created conditions that might stimulate a substantive values argument. The evolution of the Internet and digital communications since the mid-1990s has significantly contributed to such conditions.

IV. Digital Impact on Practice and Beyond

The conditions necessary to stimulate free speech theory based on substantive affirmative values are uncertainty and disagreement about excessive free speech in a society. There is an interesting comparison to be made between the United States and Japan concerning the origins of speech theory. In the U.S. context, it is said that "the reemergence of theory" in the 1980s followed judicial broadening of the First Amendment. The First Amendment came to encompass a wide range of activities that far exceeded the comprehension of the classical free speech theorist such as commercial advertising and campaign contributions.⁴⁵ Some commentators began to question this broadening trend.⁴⁶ In Japan, uncertainty and disagreement about the limits of freedom of expression have not come as a result of the de jure broadening of Article 21 by the Court. Rather, they spring from the de facto situation created by the combination of rapid development of digital ^{*120} communications technology and the postwar tradition of opposition to speech regulation.

The current freedom to distribute illegal and harmful materials over the Internet was unforeseen by those who drafted Japan's Constitution after World War II. This freedom challenges the Japanese people's previous sense of the purposes and values of unfettered speech embodied in Article 21. Why, if at all, should such unlimited expansion of free speech on the Internet be tolerated? In particular, why should the victims of harmful speech be left without effective legal remedies? And if Japanese society tolerates expanded freedom on the Internet, then how can Japan's existing regulatory scheme of trifurcated communications media, increasingly converging through digitalization, be justified? The persistent skepticism about speech regulation in Japan has begun to be overshadowed by calls for new legislation to regulate speech on the Internet.

This is not the first time that serious questions about excessive freedom of speech have been raised in contemporary Japanese society. In the 1980s, Japan faced the issues of defamation and invasion of privacy by intrusive sensationalist journalism. The victims, especially private individuals, sought remedy in the courts, which usually granted only small damage awards. But the constant tensions over speech regulation within Japanese society deterred the legislative and the executive branches of

Japan's government from introducing tougher laws or regulations to restrict freedom of the press.

However, after witnessing the unprecedented scale of speech on the Internet, the Japanese people have gradually realized the seriousness of the resultant harms and the need for remedial regulation. One phenomenon arousing calls for new regulatory measures is a list of residential districts of historically discriminated Buraku⁴⁷ communities. Distribution of the list itself is not strictly within the category of defamation or privacy invasion under existing law, but the list can and is used to identify individuals who come from a Buraku community--who then face discrimination. Japan's legislative and executive branches are now considering a measure to deal with speech harms caused by existing mass media, as well as the Internet.⁴⁸

Calls for expedited measures to regulate speech on the Internet also came from the business community. Previously, Japan's government had no good reason to limit expressive activities in this medium out of economic concerns. But the Internet, originally intended for expression and association, has ^{*121} evolved to function as a platform for commercial transactions and government services as well. In the midst of a deep recession, Japanese business and government expected that the steady and secure growth of the Internet would pull the Japanese economy out of its recession. Their concern now is that if Internet content is left unregulated, the public's trust in the Internet would be lost, and the development of electronic commerce would be impeded.⁴⁹

The Japanese government's hesitant approach started to change in the late 1990s. A bill proposed by the National Public Security Committee to amend the existing Amusement Business Law passed both Houses of the Diet without a single nay vote in 1998. This measure extended conventional administrative control over sex-related amusement businesses to cyber-pornography.⁵⁰ Japan enacted a "Basic Law on the Formation of an Advanced Information and Telecommunications Network Society" (Basic Law) in 2000 to promote governmental measures dealing with information technology issues.⁵¹ Additionally, the submission to the Diet in 2001 of a bill addressing ISP liability was one of the specified priority policy measures to be taken under the Basic Law for "facilitation of electronic commerce."⁵²

V. Conclusion: The Future

In the eyes of constitutional law scholars, the Internet has suddenly transformed freedom of expression from a sacred spiritual zone of personal liberty into a heated battlefield for economic and business interests as well. Such a complicated conflict between important moral and economic concerns creates uncertainty over the appropriate limitations on speech and the sector of society from which such limitations should arise. The present situation, however, provides the underlying conditions that stimulate the development of free speech theory.

Japan's traditional "negative theories" have worked well to deter the government from speech regulation, but they are not well adapted for use in balancing competing concerns. In particular, when economic interests are invoked in speech regulation debates, the "distrust of government" argument ^{*122} becomes less persuasive. Instead of adamantly opposing any regulation of speech, Japan needs to develop substantive theories to explain what positive values its free expression system should represent. Freedom of expression has been taken for granted by the postwar generations, but now its value must be clarified in order to decide what regulatory measures are proper.

The problems associated with the Internet should not obscure its immense potential to enrich Japanese free speech theory. The Internet and other global media further Japanese exposure to unfamiliar values, beliefs, and ways of life with great speed and convenience. The basic human desire to understand the world requires the free and open exchange of information. In an age of great change, free speech is more essential than ever.⁵³ The diversification of Japanese values, beliefs, and ways of life, accelerated by the Internet, will spur the diversification of free speech theory in Japan, as diversity of theory tends to reflect the diversity of people's life in a society.

Furthermore, the global nature of the Internet constitutes yet another catalyst for development of Japanese free speech theory. Each country's "domestic" regulation of Internet speech has worldwide effects. This ideally compels each nation to take all others into account in formulating its policies. Thus, Japan might have to join international coordination or harmonization efforts before adopting its own domestic measures. The values underlying a nation's attitude toward free speech and Internet regulation (whether too permissive or too restrictive) will necessarily be subjected to international scrutiny. Japan will have to justify its regulatory measures to international and domestic critics.

Thus, the inherently international nature of the Internet, when combined with Japan's globally oriented economy, will inevitably fortify Japanese free speech theory, limiting the de facto expansion of free speech brought by the Internet and shaping the future of Japan's de jure free speech.

Footnotes

- a1 Associate Professor of Information Law and Policy, Interfaculty Initiative in Information Studies, Graduate School of Interdisciplinary Information Studies, Institute of Socio-Information and Communication Studies (dual appointment), The University of Tokyo. The author wishes to express her thanks to the staff of the Stanford Journal of International Law for this opportunity and their insight during the editing process, and to Dean Junichi Hamada and Professor Pnina Lahav for their thoughtful comments. The author extends her thanks as well to Professor Jonathan Zittrain, Berkman Center for Internet and Society, for supporting her research at Harvard Law School in 1999-2000; and to the International House of Japan, Hosono Bunka Foundation, and the Ministry of Education, Culture, Sports, Science and Technology of the Japanese Government for research grants.
The author provided all translations from Japanese for this Article.
- 1 The term “freedom of expression” includes all expressive freedoms in any form or medium as indicated in Article 21 of our postwar Constitution. Kenpo [Constitution] art. 21, para. 1 (Japan). For the English translation of the Japanese Constitution, see http://www.kantei.go.jp/foreign/constitution_and_government/frame_01.html. Note that in this article, as in Japan, the term “freedom of expression” is used interchangeably with “freedom of speech.”
- 2 Kenpo, art. 21, para. 1 (emphasis added).
- 3 Id. arts. 12, 13.
- 4 Laurence H. Tribe, American Constitutional Law §12-25, at 1003 (2d ed. 1988).
- 5 Keiho [Penal Code], art. 175.
- 6 Kenpo, art. 31.
- 7 Waisetsu toga kouzen chinretsu hikoku jiken [Case on Defendant Concerning the Public Display of Obscene Pictures], 1996 Kei-Wa 302 (Tokyo Dist. Ct., Apr. 22, 1996); Hanketsu roku, Keiji, Tokyo-chi-han 8-4-22 [Records of Judgment, Criminal Case, Tokyo District Court Judgment, Apr. 22, 1996], 1597 Hanrei Jiho 151 [Topical Report of Judgment] (1997).
- 8 Waisetsu butsu kouzen chinretsu hikoku jiken [Case on Defendant Concerning the Publicly Display of Obscene Materials], 1999 (A) No. 1221 (Sup. Ct., July 16, 2001); Hanketsu Roku, Keiji, Sai-san-Ketsu 13-7-16 [Records of Judgment, Criminal Case, The Supreme Court, Third Petit Bench Decision, July 16, 2001], 1762 Hanrei Jiho 150 (2001).
- 9 Denki tsuushin jigyou hou [Telecommunications Business Law], Law No. 86 of 1984, art. 4, no. 1-2. For violation of that secrecy requirement, Article 104 stipulates imprisonment or a fine.
- 10 Kenpo, art. 21, para. 2.
- 11 Ideta v. Iwamoto, 19 Kokeishu 58 (Osaka High Ct., Feb. 26, 1966); see also Yuubin hou [Postal Law], Law No. 165 of 1947, art. 9.
- 12 Press Release, Ministry of Posts and Telecommunications of Japanese Government, Jouhoutsuushin no futekiseiriyo to kujyoshori no arikata ni kansuru kenkyukaihoukokusho [Research Group Report on How to Deal with Improper Use and Complaint in Info-Communications], at http://www.joho.soumu.go.jp/pressrelease/japanese/tsusin/990201j501_05.html#0402 (Feb. 1, 1999).

- 13 For instance, the petitioner of the first online defamation case, the “Nifty case,” Songai baishou seikyu jiken [Case on Claim for Damages], 1994-7784 Honso 24828 (Tokyo Dist. Ct., May 26, 1997) [hereinafter Nifty case], claimed in court that she had difficulty identifying the sender of the defamatory messages because the ISP invoked this statutory secrecy obligation and declined to disclose the sender’s name and address to her.
- 14 Telecommunications Business Law, art. 3.
- 15 47 U.S.C § 230(c)(1)-(2) (2000). The purpose of the broad immunity given the ISP under the “Good Samaritan” provision was clarified in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) and *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998).
- 16 Nifty case, 1994-7784 Honso 24828; Hanrei Tokuhou, Tokyo-chi-han 9-5-26 [Special Report on Judgment, Tokyo District Court Judgment, May 26, 1997], 1610 Hanrei Jiho 22 (1997). All respondents appealed. On appeal, a High Court decision in 2001 affirmed in part and reversed in part, holding the sender liable but the system operator and telecommunications business operator not liable. Unpublished opinion (Tokyo High Ct., Sept. 5, 2001) (on file with the author). The High Court sustained the ISP liability standard set by the district court, but the High Court found that the system operator had not delayed unreasonably in removing a defamatory message.
- 17 For instance, in the area of cyber-pornography, the Diet amended the existing law on the amusement business in 1998, see *infra* note 50. The revised law requires the ISP to make an effort to take necessary measures to prevent certain kinds of users from sending obscene images when the ISP knows those users uploaded such images. This requirement follows the Nifty standard set out by the Tokyo District Court. The law was revised in 2001 to require the ISP to make the same effort for pornographic images of children as well.
- 18 Nifty case, 1994-7784 Honso 24828.
- 19 Tokutei denkitsushin ekimuteikyosha no songaibaishou sekinin no seigen oyobi hashinshajouhou no kaiji ni kansuru houritsu [Law on Limitation of Liability of Specified Telecommunications Service Provider for Damages and Disclosure of the Sender Information], Law No. 137 of 2001, available at http://www.soumu.go.jp/joho_tsusin/top/pdf/jyoubun.pdf (official text and explanatory materials).
- 20 Sup. Ct. Decision on July 16, 2001, *supra* note 8.
- 21 Ex parte Takemoto, 41 Keishu 15 (Sup. Ct., Mar. 3, 1987). The material at issue consisted of street posters announcing a meeting of the Japanese Communist Party.
- 22 Koushoku senkyou hou [Public Office Election Law], Law No. 100 of 1950. See, e.g., Ex parte Anzai, 9 Keishu 819 (Sup. Ct., Apr. 6, 1955) (restricting distribution of campaign materials); Ex parte Takatsu, 35 Keishu 568 (Sup. Ct., July 21, 1981) (banning door-to-door campaign canvassing).
- 23 The prewar criminal defamation provision, Article 230 of the Criminal Law, punished even truthful statements of fact. Keiho, art. 230. The Criminal Law was revised in 1947 to add a new section, Article 230-2, after Article 230, in order to create the truth defense and other protective devices. *Id.* art. 230-2. Article 230-2 expanded the truth defense provided in the repressive prewar press statute, Shinbunshi hou [Newspaper Law], Law No. 41 of 1909, which was abolished after World War II. The postwar Supreme Court gradually expanded the truth defense. The Court reversed one conviction on the grounds that there was no crime of defamation if a defendant proved he had “considerable reason” to believe the facts he had alleged were true. Ex parte Kawachi, 23 Keishu 975 (Sup. Ct., June 25, 1969). Also, in the context of civil defamation, the Supreme Court employed the “considerable reason” standard similarly under Article 710 of the Civil Law. Fujito v. Yomiuri Co., 20 Minshu 1118 (Sup. Ct., June 23, 1966).

- 24 Damage awards in Japanese defamation cases are generally higher when the plaintiff is a Diet member rather than a private individual. Japanese courts tend to count the reputation of high-ranking public officials as more valuable than that of private individuals. Japan's Supreme Court has not adopted the "actual malice" standard formulated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), although there was a minority opinion proposing adoption of that standard. See *Hoppou Journal Co., Ltd. v. The Japanese Government*, 40 Minshu 872 (Sup. Ct., June 11, 1986) (Taniguchi, J., concurring).
- 25 See *Ex parte Koyama*, 11 Keishu 997 (Sup. Ct., Mar. 13, 1957) (punishing the Japanese translator and publisher of the Japanese translation of "Lady Chatterley's Lover" under the criminal obscenity provision).
- 26 See, e.g., *Ex parte Ishii*, 23 Keishu 1239 (Sup. Ct., Oct. 15, 1969) (dealing with the definition of "obscenity" in Article 175 and citing the "Lady Chatterley's Lover" judgment as precedent to uphold the constitutionality of Article 175); *Ex parte Sato*, 34 Keishu 433 (Sup. Ct., Nov. 28, 1980) (same); *Ex parte Otsubo*, 37 Keishu 1295 (Sup. Ct., Oct. 27, 1983) (citing the "Lady Chatterley's Lover" judgment and the *Ex parte Ishii* judgment, supra, and simply holding Article 175 constitutional).
- 27 "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act." Kenpo, art. 81. It has been established by case law that the lower courts have the power of judicial review as well.
- 28 Most bills in Japan are drafted by ministries and introduced by the Cabinet, rather than Diet members. It usually takes months, and often years for a bill to be drafted and to go through the extensive bureaucratic system that checks coordination with related existing laws and constitutional compatibility before the bill is submitted to the Diet for voting. For an explanation of legislative process in the case of Cabinet-introduced bills, see The Cabinet Legislation Bureau, The Law-Making Process, available at <http://www.clb.go.jp/english/11/11a.htm>.
- 29 For an overview of the postwar endeavors of constitutional law scholars, see Masato Ichikawa, *Hyogen no jiyuuron no gojyunen* [Five Decades of Theories on Freedom of Expression], 59 *Koho Kenkyu* [Pub. L. Rev.] 252 (1997).
- 30 See Yasuhiro Okudaira, *Hyogen No Jiyu* [Freedom of Expression], Vol. 1-3 (1983-84); Nobuyoshi Ashibe, *Gendai Jinken Ron* [Contemporary Human Rights Theories] (1973).
- 31 See, e.g., *Koza Kenpo Sosho* [Course in Constitutional Litigation], Vol. 1-3 (Nobuyoshi Ashibe ed., 1987).
- 32 *Matsue v. Harashima*, 38 Minshu 1308 (Sup. Ct., Dec. 12, 1984).
- 33 *Id.*
- 34 *Keiho*, art. 175.
- 35 *Matsue v. Harashima*, 38 Minshu 1308 (Sup. Ct., Dec. 12, 1984). The court split over the vagueness and breadth of the phrase "to injure public security or public morals" in *Kanzei teiritsu hou* [Customs Tariff Law], Law No. 54 of 1910, art. 21, no. 1-3, and its application (the law at issue before the Court was prior to the amendment by Law No. 7 of 1980). Justice Masami Ito and three other dissenting Justices (out of a total of fifteen) found the provision unconstitutionally vague and overbroad, and therefore void.
- 36 See, e.g., Yasuhiro Okudaira, *Naze "Hyogen No Jiyu" Ka* [Why "Freedom of Expression?"] (1988).
- 37 Laurence H. Tribe, *American Constitutional Law* §12-1, at 785-89 (2d ed. 1988); Gerald Gunther & Kathleen M. Sullivan, *Constitutional Law* 1025-29 (13th ed. 1997).

- 38 Geoffrey R. Stone et al., *Constitutional Law* 1073, 1078-86 (3d ed. 1996).
- 39 Donald M. Gillmor et al., *Mass Communication Law: Cases and Comment* 5-11 (6th ed. 1998).
- 40 Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* §2:3, at 2-3 (3d ed. 1996).
- 41 Gunther & Sullivan, *supra* note 37, at 1028-29.
- 42 *Hoppou Journal Co., Ltd. v. The Japanese Government*, 40 Minshu 872 (Sup. Ct., June 11, 1986). The magazine included a defamatory statement against the respondent, a candidate for governor of Hokkaido. Despite upholding the constitutionality of a preliminary injunction on the publication of petitioner's magazine, the Supreme Court stated that the foundation of a democratic nation where sovereign power resides with the people is that "the people as constituents of that nation may express any doctrine, advocacy of doctrine and the like, as well as receive such information from each other...." Therefore, the court reasoned that freedom of expression, especially the freedom of expression relating to public matters, must be "respected as a particularly important constitutional right in a democratic nation."
- 43 *Ienaga v. The Japanese Government*, 47 Minshu 3483 (Sup. Ct., Mar. 16, 1993); *Ienaga v. The Japanese Government*, 51 Minshu 2921 (Sup. Ct., Aug. 29, 1997). The School Education Law required elementary, junior high, and high schools to use authorized textbooks that passed examination by the Minister of Education. *Gakkoukyouiku hou* [School Education Law], Law No. 26 of 1947, arts. 21, 40, 51. The examination was not only a formal check for factual or typographical errors, but also of substantive content and of whether certain requirements were met. For example, it checked whether a textbook served the educational purpose and policy stipulated by the *Kyouiku kihon hou* [Fundamental Law of Education], Law No. 25 of 1947, and the purpose of the school stipulated by the School Education Law. It also reviewed whether the textbook achieved the aim stipulated by the relevant course of study and whether the textbook's political and religious position was fair. The textbook titled *New Japanese History*, written by petitioner Professor Saburo Ienaga of the Tokyo Education University, repeatedly "failed" the examination. The petitioner brought a series of lawsuits against the Japanese government, challenging the constitutionality of these failure judgments and demanding revocation of the failure judgments and damages. See *Ienaga*, 51 Minshu at 2925-26.
- 44 One such description was contained in a footnote, and referred to "Unit No. 731," described in the text as "a unit for bacteriological warfare" that conducted cruel experiments on live persons. In the examination of 1983, the Minister of Education stated that it was necessary to eliminate that description in its entirety. The reason given was that it was premature to refer to Unit No. 731 in the textbook, "because trustworthy academic research, theses, and books have not yet been published at the present time and it is inappropriate in terms of choice and treatment." See *Ienaga*, 51 Minshu 2945-46. The Supreme Court's 1997 judgment held that this part of the Minister of Education's opinion to amend the textbook was "beyond the scope of discretion" and "illegal." *Id.* at 2947-48.
- 45 Frederick Schauer, *Must Speech Be Special?*, 78 Nw. U. L. Rev. 1284, 1287-88 (1983). A premier scholar in the field of philosophical justification of free speech protection, Professor Schauer is described as "the first of his generation to conclude that the Court went too far." L. A. Powe, Jr., *Propter Honoris Respectum: Situating Schauer*, 72 Notre Dame L. Rev. 1519, 1522 (1997).
- 46 Powe, *supra* note 45, at 1522-23 ("Schauer's First Amendment scholarly career can best be understood as a thoughtful reaction to what he perceived as the Warren and Burger Court excesses and cheerleading of the period's two leading First Amendment scholars, Thomas Emerson and Harry Kalven.").
- 47 "Buraku" people are not a racial or national minority but "a caste-like minority among the ethnic Japanese," generally recognized as "descendants of outcast populations" from Japan's feudal era. There are estimated to be as many as three million Buraku people, in over six thousand communities. See The Buraku Liberation and Human Rights Research Institute, *What is Buraku*

Discrimination?, at http://blhri.org/blhri_e/blhri/buraku.htm (last visited Feb. 24, 2002).

- 48 For example, the Ministry of Justice is weighing the creation of an independent administrative institution to provide remedies for human rights violations such as discrimination and abuse, as well as harms caused by public authorities and the media, for which existing judicial remedies are ineffective. The distribution of a list of Buraku communities on the Internet is one of the pressing discrimination issues. See Ministry of Justice of Japanese Government, Jinken yougo suishin shingikai, Jinken kyusai seido no arikata ni tsuite (toushin) [Human Rights Protection Promotion Council, On Human Rights Remedy System (Report)], May 25, 2001, at <http://www.moj.go.jp/SHINGI/010525/010525-04.html#1-2-2>.
- 49 This notion was described in a Japanese government policy paper. Japanese Government, Basic Guidelines on the Promotion of an Advanced Information and Telecommunications Society (1998). The Japanese government listed the limitation of illegal/harmful Internet content as necessary to promote electronic commerce. See generally Itsuko Yamaguchi, Where will the Freedom of the Internet go?: A Japanese Perspective, 5 Rev. of Media, Info. & Soc'y 1 (2000) (analyzing recent Japanese government's visions of economic policy in the information age).
- 50 Fuzoku eigyoto no kisei oyobi gyomu no tekiseikato ni kansuru houritsu no ichibu wo kaisei suru houritsu [Law to Amend a Part of Law on Regulation of Amusement Businesses and Improvement etc. of the Service], Law No. 55 of 1998. Its scope of regulated speech was carefully determined through reviewing the related regulations of foreign countries, particularly the U.S. Communications Decency Act (Telecommunications Act of 1996), [Pub. L. No. 104-104, Title V, 110 Stat. 56, 133-43 \(1996\)](#), in [47 U.S.C. §230 \(2002\)](#); [Reno v. ACLU, 521 U.S. 844 \(1997\)](#).
- 51 Koudou jouhou tsuushin network shakai keisei kihon hou [Basic Law on the Formation of an Advanced Information and Telecommunications Network Society], Law No. 144 of 2000.
- 52 See e-Japan Juuten Keikaku [e-Japan Priority Policy Program], Mar. 29, 2001, Title IV, (3)(2)(ii), available at <http://www.kantei.go.jp/foreign/it/network/priority-all/5.html>.
- 53 Based on the concept of personal autonomy and of values-pluralism, Professor Joseph Raz argues that "[a]n important case for the importance of freedom of expression" arises out of the fact that "public portrayal and expression of forms of life validates the styles of life portrayed, and that censoring expression normally expresses authoritative condemnation not merely of the views or opinions censored but of the whole style of life of which they are a part." The meaning of the "validating" function is to give certain forms of life "the stamp of public acceptability," so they remain open to personal choice. Joseph Raz, Free Expression and Personal Identification, 11 Oxford J. Legal Stud. 303, 309-11 (1991). Professor Raz's insights are particularly helpful when considering the implications of the openness and interaction of cyberspace communications for a future free speech system.

End of Document

© 2011 Thomson Reuters. No claim to original U.S. Government Works.

HEINONLINE

Citation: 79 N.Y.U. L. Rev. 1 2004

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Tue May 3 07:27:25 2011

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0028-7881](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0028-7881)

NEW YORK UNIVERSITY LAW REVIEW

VOLUME 79

APRIL 2004

NUMBER 1

COMMENTARIES

DIGITAL SPEECH AND DEMOCRATIC CULTURE: A THEORY OF FREEDOM OF EXPRESSION FOR THE INFORMATION SOCIETY

JACK M. BALKIN*

In this essay, Professor Balkin argues that digital technologies alter the social conditions of speech and therefore should change the focus of free speech theory, from a Meiklejohnian or republican concern with protecting democratic process and democratic deliberation, to a larger concern with protecting and promoting a democratic culture. A democratic culture is a culture in which individuals have a fair opportunity to participate in the forms of meaning-making that constitute them as individuals. Democratic culture is about individual liberty as well as collective self-governance; it concerns each individual's ability to participate in the production and distribution of culture. Balkin argues that Meiklejohn and his followers were influenced by the social conditions of speech produced by the rise of mass media in the twentieth century, in which only a relative few could broadcast to large numbers of people. Republican or progressivist theories of free speech also tend to downplay the importance of nonpolitical expression, popular culture, and individual liberty. The limitations of this approach have become increasingly apparent in the age of the Internet.

By changing the social conditions of speech, digital technologies lead to new social conflicts over the ownership and control of informational capital. The free speech principle is the battleground over many of these conflicts. For example, media companies have interpreted the free speech principle broadly to combat regulation of digital networks and narrowly in order to protect and extend their intellectual property rights. The digital age greatly expands the possibilities for individual participation in the growth and spread of culture, and thus greatly expands the pos-

* Copyright © 2004 by Jack M. Balkin. Knight Professor of Constitutional Law and the First Amendment, Yale Law School. My thanks to Bruce Ackerman, Yochai Benkler, Owen Fiss, Eddan Katz, Nimrod Kozlovski, Orly Lobel, Guy Pessach, Robert Post, Reva Siegel, Gunther Teubner, Rebecca Tushnet, Tal Zarsky, and Jonathan Zittrain for their comments on previous drafts.

sibilities for the realization of a truly democratic culture. But the same technologies also produce new methods of control that can limit democratic cultural participation. Therefore, free speech values—interactivity, mass participation, and the ability to modify and transform culture—must be protected through technological design and through administrative and legislative regulation of technology, as well as through the more traditional method of judicial creation and recognition of constitutional rights. Increasingly, freedom of speech will depend on the design of the technological infrastructure that supports the system of free expression and secures widespread democratic participation. Institutional limitations of courts will prevent them from reaching the most important questions about how that infrastructure is designed and implemented. Safeguarding freedom of speech will thus increasingly fall to legislatures, administrative agencies, and technologists.

INTRODUCTION: NOVELTY AND SALIENCE

What do digital technologies teach us about the nature of freedom of speech? How should our theories of freedom of expression change to take these technologies into account? In this essay, I argue that the Internet and digital technologies help us look at freedom of speech from a different perspective. That is not because digital technologies fundamentally change what freedom of speech is. Rather, it is because digital technologies change the social conditions in which people speak, and by changing the social conditions of speech, they bring to light features of freedom of speech that have always existed in the background but now become foregrounded.

This effect—making more central and visible what was already always present to some degree—is important in any study of the Internet and digital technologies. In studying the Internet, to ask “What is genuinely new here?” is to ask the wrong question. If we assume that a technological development is important to law only if it creates something utterly new, and we can find analogues in the past—as we always can—we are likely to conclude that because the development is not new, it changes nothing important.¹ That is the wrong way to think about technological change and public policy, and in particular, it is the wrong way to think about the Internet and digital technologies.

Instead of focusing on novelty, we should focus on salience. What elements of the social world does a new technology make particularly salient that went relatively unnoticed before? What features of human activity or of the human condition does a technological change

¹ See, e.g., Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 216 (arguing that clear rules, property rights, and facilitating bargains will resolve regulatory problems in cyberspace much as they do in real space); Joseph H. Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L.J. 1145, 1148 (2000) (“[F]ew of the legal issues posed by the new informatics technologies are novel.”).

foreground, emphasize, or problematize? And what are the consequences for human freedom of making this aspect more important, more pervasive, or more central than it was before?

The digital revolution places freedom of speech in a new light, just as the development of broadcast technologies of radio and television did before it. The digital revolution brings features of the system of free expression to the forefront of our concern, reminding us of things about freedom of expression that were always the case, but now have become more central and thus more relevant to the policy issues we currently face. The digital revolution makes possible widespread cultural participation and interaction that previously could not have existed on the same scale. At the same time, it creates new opportunities for limiting and controlling those forms of cultural participation and interaction. The digital age makes the production and distribution of information a key source of wealth. Therefore it creates a new set of conflicts over capital and property rights that concern who has the right to distribute and gain access to information. Not surprisingly, the free speech principle sits at the center of these conflicts. Freedom of speech is rapidly becoming the key site for struggles over the legal and constitutional protection of capital in the information age, and these conflicts will shape the legal definition of freedom of speech. The digital revolution offers unprecedented opportunities for creating a vibrant system of free expression. But it also presents new dangers for freedom of speech, dangers that will be realized unless we accommodate ourselves properly to the changes the digital age brings in its wake. The emerging conflicts over capital and property are very real. If they are resolved in the wrong way, they will greatly erode the system of free expression and undermine much of the promise of the digital age for the realization of a truly participatory culture.

Digital technologies highlight the cultural and participatory features of freedom of expression. In this essay, I offer a theory of freedom of speech that takes these features into account. The purpose of freedom of speech, I shall argue, is to promote a democratic culture. A democratic culture is more than representative institutions of democracy, and it is more than deliberation about public issues. Rather, a democratic culture is a culture in which individuals have a fair opportunity to participate in the forms of meaning making that constitute them as individuals.² Democratic culture is about individual liberty as well as collective self-governance; it is about each

² See J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1948–49 (1995) (reviewing CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993), and defining democratic culture as popular participation in culture).

individual's ability to participate in the production and distribution of culture.

Freedom of speech allows ordinary people to participate freely in the spread of ideas and in the creation of meanings that, in turn, help constitute them as persons. A democratic culture is democratic in the sense that everyone—not just political, economic, or cultural elites—has a fair chance to participate in the production of culture, and in the development of the ideas and meanings that constitute them and the communities and subcommunities to which they belong.³ People have a say in the development of these ideas and meanings because they are able to participate in their creation, growth, and spread.

Like democracy itself, democratic culture exists in different societies in varying degrees; it is also an ideal toward which a society might strive. Freedom of expression protects the ability of individuals to participate in the culture in which they live and promotes the development of a culture that is more democratic and participatory.

Freedom of speech is *interactive* and *appropriative*. It is interactive because speech is about speakers and listeners, who in turn become speakers themselves. Speech occurs between people or groups of people; individual speech acts are part of a larger, continuous circulation. People participate in culture by interacting with others and influencing and affecting them through communication. This is obvious in the case of speech directed at persuasion, but is true of all speech. Even when we dislike what someone else is saying, we are often affected and influenced by it. Our exposure to speech, our attempt to understand it, to bring it within our understanding, continually reshapes us. Our continuous participation in cultural communication, our agreement with and reaction to what we experience, our assimilation and rejection of what culture offers us, makes us the sort of people that we are.

Freedom of speech is appropriative because it draws on existing cultural resources; it builds on cultural materials that lay to hand. Dissenters draw on what they dislike in order to criticize it; artists borrow from previous examples and build on artistic conventions; even casual conversation draws on common topics and expressions. People par-

Media and popular culture theorist John Fiske has coined the term "semiotic democracy" to describe popular participation in the creation of meanings, often by turning existing forms of mass culture to different uses. JOHN FISKE, *TELEVISION CULTURE* 236–39 (1987); see also Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 146 (1993) (defining semiotic democracy as "a society in which all persons are free and able to participate actively, if not equally, in the generation and circulation of meanings and values"). Fiske's idea has become particularly important in the intellectual property literature. See *infra* note 56.

³ Balkin, *supra* note 2, at 1948–49.

ticipate in culture through building on what they find in culture and innovating with it, modifying it, and turning it to their purposes. Freedom of speech is the ability to do that. In a democratic culture people are free to appropriate elements of culture that lay to hand, criticize them, build upon them, and create something new that is added to the mix of culture and its resources.

The idea of a democratic culture captures the inherent duality of freedom of speech: Although freedom of speech is deeply individual, it is at the same time deeply collective because it is deeply cultural. Freedom of speech is, in Thomas Emerson's words, a system.⁴ It is a cultural system as well as a political system. It is a network of people interacting with each other, agreeing and disagreeing, gossiping and shaming, criticizing and parodying, imitating and innovating, supporting and praising. People exercise their freedom by participating in this system: They participate by interacting with others and by making new meanings and new ideas out of old ones. Even when people repeat what others have said, their reiteration often carries an alteration in meaning or context.⁵ As people express themselves, make music, create works of art, sing, gossip, converse, accuse, deny, complain, celebrate, enthuse, boast, and parody, they continually add something to the cultural mixture in which they live. They reshape, however imperceptibly, cultural conventions about what things mean, what is proper and improper, what is important and less important, how things are done and how they are not done. Through communicative interaction, through expression, through exchange, individual people become the architects of their culture, building on what others did before them and shaping the world that will shape them and those who follow them. And through this practice of interaction and appropriation, they exercise their freedom.

Freedom of speech is thus both individual and cultural. It is the ability to participate in an ongoing system of culture creation through the various methods and technologies of expression that exist at any

⁴ THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 3 (1970).

⁵ Cf. Jacques Derrida, *Limited Inc a b c . . .*, in 2 *GLYPH* 162, 200 (1977) ("Iterability alters[.]"). Jed Rubenfeld expresses a similar idea through the metaphor of imagination. He argues that freedom of speech protects the rights of both authors and readers because acts of imagination are inevitably transformative, both for producers and receivers of cultural objects. Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 *YALE L.J.* 1, 37-38 (2002). Rebecca Tushnet points out that repetition of ideas or social scripts can be a way of expressing solidarity with others, support for a favored cause, or one's own sense of propriety as a member of a religious, political, or social group. Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 *B.C. L. REV.* 1, 16-17 (2001).

particular point in time. Freedom of speech is valuable because it protects important aspects of our ability to participate in the system of culture creation. Participation in culture is important because we are made of culture; the right to participate in culture is valuable because it lets us have a say in the forces that shape the world we live in and make us who we are.

The digital age provides a technological infrastructure that greatly expands the possibilities for individual participation in the growth and spread of culture and thus greatly expands the possibilities for the realization of a truly democratic culture. But the same technologies also can produce new methods of control that can limit democratic cultural participation. Therefore, free speech values—interactivity, mass participation, and the ability to modify and transform culture—must be protected through technological design and through administrative and legislative regulation of technology, as well as through the more traditional method of judicial creation and recognition of constitutional rights. Increasingly, freedom of speech will depend on the design of the technological infrastructure that supports the system of free expression and secures widespread democratic participation. Institutional limitations of courts will prevent them from reaching the most important questions about how that infrastructure is designed and implemented. Safeguarding freedom of speech will increasingly fall to legislatures, administrative agencies, and technologists. Protecting freedom of speech in the digital age will require a new class of cyberlawyers, who understand the impact of technological design on free speech values and can help shape regulatory solutions that promote technologies that, in turn, will help secure the values of free expression.

I

HOW THE DIGITAL AGE CHANGES THE CONDITIONS OF SPEECH

The next Part of this essay describes how the digital revolution alters our perspective on freedom of speech and leads to a series of disputes about what the free speech principle means. By the “digital revolution,” I mean the creation and widespread availability of technologies that make it easy to copy, modify, annotate, collate, transmit, and distribute content by storing it in digital form. These technologies also include the development of vast communication networks that connect every part of the world for the purpose of distributing digital content. The digital revolution changes the factual assumptions

underlying the social organization and social practices of freedom of speech in four important ways.

First, the digital revolution drastically lowers the costs of copying and distributing information. Large numbers of people can broadcast and publish their views cheaply and widely. Websites, for example, are easy to construct and easy to access. We do not yet know how low the costs of information transfer will become. For example, the development of weblogs (or blogs) allows people to publish content to the Internet with the press of a button, lowering the costs of publication and distribution even further.

Before the Internet, free speech theorists worried about the scarcity of bandwidth for broadcast media. Frequencies were limited, so only a relatively few people could broadcast to a large number of people. The digital revolution made a different kind of scarcity salient. It is not the scarcity of bandwidth but the scarcity of audiences, and, in particular, scarcity of audience attention. My speech has always competed with yours; as the costs of distribution of speech are lowered, and more and more people can reach each other easily and cheaply, the competition for audience attention has grown ever more fervent.⁶ An interesting side effect of lowering the costs of distribution and transmission is that it can alter the relative costs of receiving versus sending information. Although receiving information is easier, sending information can become even less costly. The classic example is spam e-mail, which shifts the costs of distribution from speakers to audiences. Because so many people are producing content and sending it everywhere, audiences are pummeled with vast amounts of information which they must collate, sort, filter, and block. Hence, the digital revolution brings to the forefront the importance of organizing, sorting, filtering, and limiting access to information, as well as the cultural power of those who organize, sort, filter, and limit access.⁷

Second, the digital revolution makes it easier for content to cross cultural and geographical borders. Not only can speakers reach more people in the country in which they live, they can also interact with

⁶ See Jack M. Balkin, *Free Speech From a Meme's Point of View* 8, 13 (Apr. 4, 2003) (unpublished manuscript, on file with *New York University Law Review*) (explaining rapid growth of expression on Internet in terms of lowered costs of production and distribution of information).

⁷ See J.M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1145 (1996) ("In the Information Age, the informational filter, not information itself, is king."); James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 194 (1997) (noting that filtering technologies supply state with "a different arsenal of methods with which to regulate content").

and form new communities of interest with people around the globe. It has long been possible to send information globally, but the cost and effort were comparatively great. The Internet gives people abilities that were previously enjoyed only by large commercial enterprises; it offers them access to an infrastructure for sending information worldwide.⁸

Third, the digital revolution lowers the costs of innovating with existing information, commenting on it, and building upon it. An important feature of the digital revolution is the development of common standards for storing and encoding information digitally. Common standards are absolutely crucial to lowering the costs of transmission and distribution. (We might make a rough analogy to the role of standardization that accompanied the Industrial Revolution.) However, the same features of content that make it possible for people to transmit and distribute information cheaply and easily also make it possible to manipulate, copy, and alter information cheaply and easily. In the past it was always possible to copy a text or a drawing by hand, but such copying was comparatively expensive and time-consuming. Once people have a common metric for storing images, music, and text, they can copy, cut, and paste information and send it to others. Common standards for encoding images, music, and text not only make it easy to copy and distribute content, they also make it easier to appropriate, manipulate, and edit content.

The link between the ability to copy and the ability to modify information is central to understanding the possibilities created by the digital revolution. Consumers of digital media products⁹ are not simply empowered to copy digital content; they are also empowered to alter it, annotate it, combine it, and mix it with other content and produce something new. Software allows people to innovate with and comment on other digital media products, including not only text, but also sounds, photographs, and movies. The standard example is the well-known story of *The Phantom Edit*, in which an individual reedited George Lucas's *Star Wars* movie *The Phantom Menace* to eliminate as much as possible of the screen time devoted to a particularly obnoxious character, Jar Jar Binks.¹⁰ *The Phantom Edit* exempli-

⁸ Lowering the costs of distribution also allows more speakers to reach across existing cultural, geographical, and disciplinary boundaries. It allows information to get past previously closed communities, it enables new communities to form based on existing interests, and it helps create new interests around which communities can form.

⁹ I borrow this term from C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* 7-14 (2002) (noting important differences between media products and typical non-information goods).

¹⁰ On *The Phantom Edit*, see Richard Fausset, *A Phantom Menace?*, L.A. TIMES, June 1, 2002, at F1.

fies what the digital age makes possible. It is not simply piracy; it is also innovation, although certainly not the sort of innovation that LucasFilms was interested in promoting.¹¹ This innovation goes hand in hand with the possibility of digital piracy; both are forms of appropriation made possible by digital technologies and digital communications networks. Lowering the costs of both distribution and appropriation are central features of the digital age. Digital media, in short, invite not only simple copying but also annotation, innovation, and collage.¹²

Fourth, and most important, lowering the costs of transmission, distribution, appropriation, and alteration of information democratizes speech. Speech becomes democratized because technologies of distribution and transmission are put in the hands of an increasing number of people and increasingly diverse segments of society throughout the planet. More and more people can publish content using digital technologies and send it worldwide; conversely, more and more people can receive digital content, and receive it from more and more people. Equally important, speech becomes democratized because technologies of innovation are available to a wider range of people. In the digital age, distribution and innovation go hand in hand.

II

ROUTING AROUND AND GLOMMING ON

In the early days of the Internet, many people assumed that the Internet would displace the mass media and publishing houses as traditional gatekeepers of content and quality. This has not occurred. Rather, the Internet has provided an additional layer of communica-

¹¹ Asked about the phenomenon by an interviewer, Lucas explained, [E]verybody wants to be a filmmaker. Part of what I was hoping for with making movies in the first place was to inspire people to be creative. *The Phantom Edit* was fine as long as they didn't start selling it. Once they started selling it, it became a piracy issue. I'm on the Artist Rights Foundation board, and the issue of non-creators of a movie going in and changing things and then selling it as something else is wrong.

Gavin Smith, *The Genius of the System: George Lucas Talks to Gavin Smith About Painting by Numbers, Mind-Numbing Minutiae, and Final Cuts*, FILM COMMENT, July-Aug. 2002, at 31, 32.

¹² James Boyle argues that a characteristic feature of the information society is that an increasing proportion of product cost goes to content creation rather than to distribution, and to message rather than medium. James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L.J. 87, 93-94 (1997). That is not necessarily inconsistent with my argument that digital technologies lower costs of innovation: Both content creation and distribution costs are lowered, but distribution costs decline much more rapidly. In the meantime, digital technologies spur new forms of content creation that would have been prohibitively expensive (or impossible) in the past.

tion that rests atop the mass media, draws from it, and in turn influences it.

Mass media are asymmetrical and unidirectional. The ability to broadcast widely is held in relatively few hands; what is broadcast is sent out to a large number of people with very little opportunity for people to talk back. Access to mass media is comparatively limited. Mass media create a technological bottleneck, and the people who control mass media are gatekeepers controlling its use. As a result, in a world dominated by mass media, the recurring problem for people who want to speak effectively and reach large numbers of people is how to gain access to an effective podium. People can purchase access if they own a significant amount of property; in the alternative, they can stage media events to draw the mass media's attention. In the latter case, however, speakers cannot easily control their message.

The Internet offers two different strategies for dealing with the mass media: *routing around* and *glomming on*. Routing around means reaching audiences directly, without going through a gatekeeper or an intermediary. For example, you can publish content on your own website or distribute copies of your band's music on the Internet. Routing around relieves the bottleneck problem to some extent, but it does not eliminate it. Mass media are still quite important, because they are still comparatively few and individual speakers are many. Mass media provide a focal point for audience attention: Most people still pay much more attention to the relatively small number of traditional mass media speakers than they do to almost any particular website. That should not be surprising, for two reasons. First, traditional mass media have a head start in achieving a sizeable and stable audience because culture has been organized around them for so long. Second, the large number of speakers on the Internet dilutes audience share and fragments audience attention for any single website, depriving the vast majority of Internet speakers of mass audiences of the same size as the traditional mass media have enjoyed.

Therefore, although the Internet allows people to shape public opinion by routing around traditional mass media, the latter still play a crucial role in setting agendas because they still provide the lion's share of news and information to most people. Mass media remain dominant sources of entertainment, and are likely to be so for the foreseeable future. Because of economies of scale in production costs, mass media can also provide much more impressive and entertaining content than most individuals can.

The second strategy for dealing with mass media responds to this fact. It is the strategy of glomming on. To "glom on" means to appropriate and use something as a platform for innovation. "Glomming

on” as a strategy means appropriating things from mass media, commenting on them, criticizing them, and above all, producing and constructing things with them: using them as building blocks or raw materials for innovation and commentary.

The word “appropriate” means to make something one’s property. It is sometimes defined as making something one’s *exclusive* property, as in appropriating a common benefit. But the glomming on characteristic of the digital age is precisely the opposite—it is *nonexclusive* appropriation. One appropriates something for one’s own use, but others are free to appropriate it as well. This is especially the case with information goods, which are nonrivalrous and can be copied repeatedly at minimal cost.

Glomming on, then, is nonexclusive appropriation of media content for the purpose of commentary, annotation, and innovation. Here are four examples. The first is the use and development of weblogs, or blogs. Blogs grab quotes and information from other sources, including the websites run by mass media like the *New York Times* and the *Washington Post*, and use them as launching pads for commentary. Although a few blogs do original reporting, most of the blogosphere is devoted to commentary.¹³ A second example is the website Television Without Pity, run by a group of Canadian and American viewers.¹⁴ The site offers detailed scene-by-scene accounts of popular television shows in North America, laced with humorous and often biting commentary. Television Without Pity has grabbed the attention of television companies, which are eager to know how their shows are being received by their audiences.¹⁵ The strategy of glomming on allows at least some television viewers to talk back to television producers. Fan fiction sites, which are devoted to the creation of stories about particular movies, books, and television shows, are a third example of glomming on.¹⁶ *The Phantom Edit*, which I

¹³ For a list of some of the most popular blogs, see The Truth Laid Bear’s Blogosphere Ecosystem, at <http://www.truthlaidbear.com/ecosystem.php> (last visited Nov. 17, 2003).

¹⁴ See <http://www.televisionwithoutpity.com> (last visited Oct. 27, 2003).

¹⁵ Marshall Sella, *The Remote Controllers*, N.Y. TIMES, Oct. 20, 2002, (Magazine), at 70 (noting that “[i]t is now standard Hollywood practice for executive producers . . . to scurry into Web groups moments after an episode is shown on the East Coast,” hoping to discover what core viewers like and dislike).

¹⁶ For examples of fan fiction, see generally <http://www.fanfiction.net> (last visited July 10, 2003). On the clash between fan fiction and copyright law, see Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651 (1997); Ariana Eunjung Cha, *Harry Potter and the Copyright Lawyer*, WASH. POST, June 18, 2003, at A1; Tracy Mayor, *Taking Liberties with Harry Potter*, BOSTON GLOBE, June 29, 2003, (Magazine), at 14. The practice predates the Internet, see HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS & PARTICIPATORY CULTURE 152–62 (1992), but the Internet has helped spur the formation of new communities of fan fiction writers, whose

mentioned earlier, is a fourth example of glomming on; it uses a traditional mass media product as an artistic platform for innovation.

Glomming onto the work of others has always existed. It is a standard form of cultural transmission and evolution. The digital revolution enhances opportunities for glomming on to the work of traditional mass media and distributing these innovations and commentary worldwide. The point is not that more glomming on is occurring, although that may be the case, but that more people are able to glom on with greater effect. In theory, at least, digital technology allows glomming on to be broadcast as widely as the media product itself. People used to talk about last night's television programs at the water cooler the next morning; now they can publish their thoughts and distribute them to a global and anonymous audience. People have long written stories about their favorite literary characters, created parodies of familiar stories and songs, and gossiped about their favorite artists. These cultural appropriations were commonplace but moved in relatively constricted circles. They existed everywhere but were not distributed everywhere. All this has changed. The very technologies that make transmission and distribution of digital information relatively costless have made glomming on a force to be reckoned with.

What I have called glomming on—the creative and opportunistic use of trademarks, cultural icons, and bits of media products to create, innovate, reedit, alter, and form pastiches and collage—is a standard technique of speech in the digital world. Glomming on is cultural bricolage using cultural materials that lay to hand. Precisely because of the astounding success of mass media in capturing the public imagination during the twentieth century, the products of mass media, now everywhere present, are central features of everyday life and thought. Mass media products—popular movies, popular music, trademarks, commercial slogans, and commercial iconography—have become the common reference points of popular culture. Hence, it is not surprising that they have become the raw materials of the bricolage that characterizes the Internet.

Indeed, as they were originally developed, significant aspects of the Internet and digital technology facilitate glomming on. I have already mentioned the creation of common standards for encoding digital content. HTML and its successors also encourage glomming on, because they facilitate copying of source material and allow documents to point to each other. This, in turn, allows people to move

collective efforts have drawn the attention (and occasionally the ire) of television producers.

seamlessly between documents and blurs the lines between them. To be sure, these features of the digital revolution need not remain untouched: As I shall now describe, businesses have tried to erect technological and legal barriers to glomming on. My point, however, is that what gives rise to these reactions by businesses are the characteristics of digital media that facilitate the cheap and widespread appropriation, manipulation, distribution, and exchange of digital information. Those very characteristics lead to attempts to undermine, limit, and cabin the facility that digital media provide.

Indeed, routing around and glomming on are not merely specific responses to mass media; they are basic characteristics of Internet speech generally. Unless the Internet's architecture has been specifically modified to prevent it,¹⁷ it is usually possible to route around any existing channel or site of discourse and start a conversation elsewhere. Similarly, unless there are technological devices put in place to avoid it, the Internet lends itself to the nonexclusive appropriation of existing content and its subsequent modification, annotation, and parody.

III

THE SOCIAL CONTRADICTIONS OF THE DIGITAL REVOLUTION

Digital technology lowers the costs of distribution and production of content, both locally and worldwide. It makes it easier for people to innovate using existing information and copy and distribute what they produce to others. It makes it possible for more and more people to participate in the creation and distribution of new forms of public discourse, new forms of art, and new expressions of creativity.

The very same features of the digital age that empower ordinary individuals—low costs of distribution and ease of copying and transformation—empower businesses as well. Because it is easier and cheaper to copy and distribute media products worldwide, the digital age opens new markets for media products in digital formats, like compact discs, DVDs, and streaming media.

The digital revolution, after all, is an economic revolution as well as a technological one. Because more types of media and information products can be sold to more people in more places, media products and, more generally, information itself, become increasingly impor-

¹⁷ This is the major concern of LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999) [hereinafter LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE*], and LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001) [hereinafter LESSIG, *THE FUTURE OF IDEAS*].

tant sources of wealth. In the same fashion, the infrastructure necessary to communicate and distribute information widely becomes an important source of wealth. As happened in the first age of industrialization, businesses discover economies of scale in the creation and distribution of information and media products. They become larger and more powerful; media and information industries become increasingly concentrated.

So the digital age produces two crucial trends: the democratization of digital content and the increasing importance of digital content as a source of wealth and economic power. These trends quickly come into conflict. That conflict, and its consequences for freedom of speech, is the central problem of the digital age.

The irony is this: The very same features of the digital age that empower ordinary individuals also lead businesses continually to expand markets for intellectual property and digital content. Yet as businesses do so, they must deal with features of the digital age that empower consumers and give them new abilities to copy, distribute, and manipulate digital content. Businesses wish to use the new technologies to deliver more and more content to more and more consumers, providing ever new services, ever new opportunities to purchase, and ever new forms of customization. But the technologies that allow the penetration and expansion of markets also allow consumers to route around existing media and glom on to digital content.¹⁸

It is obvious that businesses are worried about digital piracy—and, more generally, forms of digital appropriation—made possible by digital technologies. That is why conflicts between freedom of speech and intellectual property have come to the forefront of concern. But

¹⁸ The basic conflict between centralized control of information production and distribution and routing around and glomming on that I have identified here has many different aspects. Yochai Benkler views the conflict in terms of contrasting methods of information production—a conflict between, on the one hand, an industrial model of protection that produces mass culture prepackaged for consumption, and, on the other, various models of nonproprietary and peer production. Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW AND CONTEMP. PROBS. 173, 181 (2003) [hereinafter Benkler, *The Public Domain*]; see also Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 562 (2000). The same technologies that allow the industrialization of the goods of the mind also make possible new forms of peer production and collaboration. See J.M. Balkin, *What Is a Postmodern Constitutionalism*, 90 MICH. L. REV. 1966, 1974, 1983 (1992) (defining postmodern era as era of industrialization of products of mind); see also Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369, 375–90 (2002) (describing rise of collaborative methods for commons-based peer production). The struggle between these models of production, which is waged both in politics and in law, will determine the “institutional ecology” of information production in the next century. Benkler, *The Public Domain*, *supra*, at 181.

businesses are also concerned about the ability of consumers to alter or even refuse the conditions under which digital content is delivered and offered. Businesses would like to offer goods and services under conditions that encourage consumers to buy them. They want to facilitate advertising that supports their ventures. They want consumers to experience digital products in ways that will encourage consumption and increase profits, and they want to structure the digital environment accordingly. But digital technologies allow consumers the ability to route around these conditions. Thus, the conflict produced by the digital age is not simply a conflict about copying and piracy. It is also a conflict about control.

In a sense, this conflict was inevitable: Once intellectual property, information exchange, and media products become important sources of wealth, it is only natural that businesses will seek to maintain their profits through increasingly aggressive forms of legal and technological control. Thus, at the very moment when ordinary people are empowered to use digital technologies to speak, to create, to participate in the creation of culture, and to distribute their ideas and innovations around the world, businesses are working as hard as possible to limit and shut down forms of participation and innovation that are inconsistent with their economic interests.

We face, in other words, what Marx would have called a contradiction in social relations produced by technological innovation.¹⁹ By “contradiction,” I don’t mean a logical contradiction, but rather an important and pervasive social conflict brought about by technological change, a conflict that gets fought out in culture, in politics, and, perhaps equally importantly, in law. The social contradiction of the digital age is that the new information technologies simultaneously create new forms of freedom and cultural participation on the one hand, and, on the other hand, new opportunities for profits and property accumulation that can only be achieved through shutting down or circumscribing the exercise of that freedom and participation.

The social conflict produced by technological change is both a conflict of interests and a conflict of values. It produces opposed ideas of what freedom of speech means. The social contradictions of the digital age lead to opposing views about the scope and purposes of the free speech principle. This conflict appears in a number of different areas. Here I will mention only two of them: intellectual property and telecommunications policy.

¹⁹ Karl Marx, *A Contribution to the Critique of Political Economy*, in *THE MARX-ENGELS READER* 4, 4–5 (Robert C. Tucker ed., 1978).

A. Intellectual Property

The first example is the growing tension between intellectual property and freedom of speech. That conflict has always existed, but new digital technologies have made it more salient and important.²⁰ In hindsight, the conflict between intellectual property and freedom of speech is obvious: The whole point of intellectual property law is to bestow monopoly rights in certain forms of expression, subject to safety valves like fair use and limited times. In fact, in the United States one can even get injunctive relief against prospective copyright infringement, which flies directly in the face of the basic presumption against prior restraints on speech.²¹

In the past, the conflict was often avoided through benign neglect. People engaged in technical violations of intellectual property rights all the time, but their activities were not widespread and distribution was relatively limited. It didn't matter much to IP owners if a few people wrote fan fiction on their typewriters, made jokes about trademarked elements in casual conversation or in limited geographic areas, or made the occasional copy of a record on their cassette tape recorder. However, once digital content could be produced and distributed at relatively low cost and broadcast around the world, owners of intellectual property became much more worried about digital copying and trademark infringement on a massive scale, even as they became increasingly interested in exploiting derivative rights in works they already owned.

Digital content produced by isolated individuals now competes more easily with existing media products, and more easily undermines or tarnishes existing trademarks. Conversely, lower costs of distribution of digital content encourage businesses to promote their rights ever more aggressively because they can expand into new geographical markets and achieve greater market penetration. Technological change exacerbates a tension that was always present but remained dormant until low-cost methods of distribution arrived on the scene. Indeed, the digital revolution is merely the latest episode in a much longer series of technological innovations that have led to the current

²⁰ On the emerging conflict between freedom of speech and intellectual property, see Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L.J. 535, 587-600 (2000) (suggesting conflict between free speech rights and database protection); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 393-401, 412-14 (1999) (arguing that given emerging methods of production of digital information, copyright promotes neither diversity of information nor free expression).

²¹ See generally Mark Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998).

conflict between freedom of speech and intellectual property rights. Throughout the twentieth century, mass media have become increasingly pervasive in cultural life. Print media spread more widely through technological innovation. The motion picture industry took off in the early part of the twentieth century, followed by radio, television, cable, and satellite broadcasting. All of these technologies changed how widely and cheaply one could distribute content. Each of them, in their own way, lowered distribution costs, even if they also raised the costs of content creation.

As these forms of mass media became increasingly pervasive parts of our life, the industries that create content—Hollywood, the publishing industry, and the advertising industry to name only three examples—began to push for increased protections of intellectual property rights. The reason is simple. Being able to distribute media products to more and more people justifies greater and greater investments in content creation, including, among other things, the assembly of vast teams of people to create movies, television shows, advertising campaigns, and the like. To recoup these costs, producers sought to squeeze as much profit as they could out of their media products, and one way to do that was to make their rights more valuable by pushing aggressively for additional legal protections.

Thus, during the twentieth century intellectual property rights have expanded both horizontally and vertically.²² Examples of horizontal expansion include increasing the scope of derivative rights that apply to a work at a particular point in time—the right to plot, characters, sequels, design features, orchestration, and so forth. Other examples are the development of process patents and the creation of trademark dilution law. Intellectual property rights have also expanded vertically, as the length of copyright terms has been repeatedly extended forward, and previous works have been retroactively given extensions to keep them in parity with newer works. A recent example in the United States is the Sonny Bono Copyright Term Extension Act of 1998,²³ named after the former pop singer and Congressman. It extended copyrights in the United States from the life of the author plus 50 years to life plus 70 years; it also extended copyright terms to 95 years after publication for works created by corporate or anonymous authors (or 120 years after creation, whichever is shorter).

²² For a summary of the expansion in copyright law, particularly since 1970, see Neil Netanel, *Locating Copyright in the First Amendment Skein*, 54 *STAN. L. REV.* 1, 18–26 (2001).

²³ Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C. § 302 (2000)).

Media companies, however, have not limited themselves to legal devices. They have also attempted to use technology to protect their interests in intellectual property. An increasingly important form of intellectual property protection involves digital rights management schemes, technological devices that prevent copying of and control access to digital content. The Digital Millennium Copyright Act of 1998²⁴ created a new species of legal rights, sometimes called “paracopyright,” that make it unlawful to circumvent these technological devices or distribute circumvention devices to others. Although digital rights management is often justified as a means of preventing unauthorized copying, it actually goes much further. It is part of a general strategy of control over access to digital content, including digital content that has been purchased by the end user.²⁵ Digital rights management schemes, for example, can make digital content unreadable after a certain number of uses; they can control the geographical places where content can be viewed; they can require that content be viewed in a particular order; they can keep viewers from skipping through commercials; and so on. Paracopyright creates legal rights against consumers and others who wish to modify or route around these forms of technological control. Once again we see how technological innovation produces social conflict: Because digital technologies make it easier to manipulate digital content in ever new ways, both businesses and consumers want increased control over how digital content is experienced.

Matters have come to a head as copying and modification of digital content have become widespread, and media companies have sought in increasingly aggressive ways to protect their existing rights and expand them further. The problem is that these legal and technological strategies are seriously curtailing freedom of expression. Not surprisingly, media companies have generally resisted the idea that freedom of speech limits the expansion of intellectual property rights. Nevertheless, at the same time that media corporations have resisted free speech objections to the expansion of intellectual property rights, they have avidly pushed for constitutional limits on telecommunications regulation on the ground that these regulations violate their own First Amendment rights.

²⁴ Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified at 17 U.S.C. §1201 (2000)).

²⁵ See generally LESSIG, *THE FUTURE OF IDEAS*, *supra* note 17, at 180–217; Niva Elkin-Koren, *It's All About Control: Rethinking Copyright in the New Information Landscape*, in *THE COMMODIFICATION OF INFORMATION* 79 (Niva Elkin-Koren & Neil W. Netanel eds., 2002).

B. Telecommunications Policy

This brings us to the second great battleground over freedom of speech: telecommunications policy. Mass media communication delivers content through some medium of transmission, whether it be spectrum, networks, telephone wires, or cables. Technologies of distribution are the “pipes” through which content travels. The key question in the digital age is who will control these “pipes.”

Historically, telecommunications policy in the United States has developed through several different models. Telephone companies have been viewed as conduits for the speech of others, exercising no independent editorial function. They are regarded as common carriers required to provide access to all. Broadcasters, cable companies, and satellite companies, by contrast, have been treated as hybrid enterprises. Because they provide programming and exercise editorial judgment, they have been treated as speakers with free speech rights. However, because they control key communications networks that are not freely available to all,²⁶ they have also been subject to structural public-interest regulation. Broadcasters were at one point required to cover public issues and cover both sides of these issues fairly; they are still required to provide equal time to political candidates and to sell advertising time to federal candidates for office; cable companies have been required to make room for public, educational and government channels, to carry signals from spectrum broadcasters, and to provide cable access to low-income areas; satellite companies have been required to set aside space for educational purposes, and so on.²⁷

²⁶ Cf. *Turner Broad. v. FCC (Turner I)*, 512 U.S. 622, 656 (1994) (arguing that monopoly power and cable architecture create bottlenecks and exclude others from speaking); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388–392, 392 (1969) (“There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all.”).

²⁷ See 47 U.S.C. § 312(a)(7) (2000) (requiring broadcasters to “allow reasonable access to or . . . permit purchase of reasonable amounts of time” to “legally qualified candidate[s] for Federal elective office”); 47 U.S.C. § 315(a) (2000) (establishing “equal opportunities” rule requiring broadcasters who permit one candidate to “use” station to permit candidate’s opponents to “use” station as well); 47 U.S.C. § 315(b) (2000) (requiring broadcasters to sell time at lowest unit charge to political candidates); 47 U.S.C. § 531(b) (2000) (authorizing franchise authorities to require cable companies to set aside space for public access, educational and government channels); 47 U.S.C. § 532(b)(1) (2000) (establishing “leased access” provisions which require cable operators to set aside channel capacity for use by commercial programmers unaffiliated with cable franchise operator); 47 U.S.C. § 541(a)(3) (2000) (requiring assurances in awarding cable franchises that cable access “is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides”); 47 U.S.C. § 335(b)(1) (2000) (requiring direct broadcast satellite operators to set aside portion of “channel capacity, equal to not less than 4 percent nor more than 7 percent, exclusively for noncommercial

The digital revolution has undermined one of the traditional justifications for structural regulation of the mass media—scarcity of bandwidth. Cable can accommodate hundreds of channels, as can satellite broadcasting. The number of speakers on the Internet seems limitless. Broadcast media now compete with cable, satellite, and the Internet for viewer attention. In theory, at least, digital technologies offer everyone the potential to become broadcasters.

Telecommunications companies have pointed to these changes as reasons to loosen or eliminate structural regulations of broadcast, cable, satellite, and Internet access. Businesses have argued that must-carry requirements for cable, open access requirements for broadband companies, limitations on how many media outlets a single business entity can own, and other structural and public interest obligations interfere with media companies' rights to convey the content they wish to as large an audience as possible. They have argued that these regulations, and others like them, violate their First Amendment rights as speakers and editors, and courts in the United States have increasingly begun to agree with them.²⁸

Implicit in these arguments is a controversial capitalist theory of freedom of speech. The theory is controversial not because it accepts capitalism as a basic economic ordering principle, but because it subordinates freedom of expression to the protection and defense of capital accumulation in the information economy. The capitalist theory identifies the right to free speech with ownership of distribution networks for digital content. Although distribution networks are "public" in the sense that lots of different people use them and rely on them for communication, their hardware and software are privately owned. Hence, businesses argue, regulation of the distribution network is a regulation of the freedom of speech of the network owner, because the network owner "speaks" through its decisions about which content to favor and disfavor. Must-carry rules interfere with the editorial judgment of cable companies; open access requirements

programming of an educational or informational nature"); *Red Lion*, 395 U.S. at 373–75 (describing fairness doctrine).

²⁸ See, e.g., *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1136, 1139 (D.C. Cir. 2001) (invalidating FCC's limits on vertical and horizontal integration of cable carriers); *Comcast Cablevision, Inc. v. Broward County*, 124 F. Supp. 2d 685, 694 (S.D. Fla. 2000) (holding that open access requirements for broadband cable violate First Amendment rights of cable system owners); see also *U.S. West, Inc. v. United States*, 48 F.3d 1092, 1095 (9th Cir. 1994) (striking down ban on telephone companies also selling video content to the public), *vacated as moot*, 516 U.S. 1155 (1996); *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 202 (4th Cir. 1994) (same), *vacated as moot*, 516 U.S. 415 (1996). The last two cases were held moot by the Supreme Court in light of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 42 U.S.C. (2000)), which repealed the statutory ban on cross-ownership.

interfere with the programming choices of broadband companies; restrictions on the amount and geographical scope of media ownership interfere with the ability of media companies to send their content to as many people as possible.

The capitalist theory is controversial precisely because telecommunication enterprises are hybrids of content providers and conduits for the speech of others. This is especially true for broadband, cable, and satellite transmission. Recent telecommunications mergers have further exacerbated this hybridization by forming a small number of large, vertically integrated media conglomerates with interests in broadcast media, cable, satellite, book publishing, movie production, telephone and Internet services.

The argument that structural regulation of telecommunications networks restricts the First Amendment rights of telecommunications companies ties the right to speak ever more closely to ownership of capital. Arguing by analogy to print media, the capitalist theory of free speech identifies the right to produce and control digital content with ownership of a communications network. Nevertheless, conflating the right to speak with the right to control a communication network is problematic for two reasons. First, because they are conduits and networks, digital communications networks are designed to provide access to multiple voices. However, under the capitalist theory, these conduits exist primarily to promote the speech of the owner of the conduit, just as newspapers exist to promote the speech of the newspaper's owner. The second problem follows from the first: Content providers who also act as conduits have incentives to favor their content over the content of others. For example, cable companies may be tempted to favor streaming media and digital music coming from the company's content providers and advertising partners, while slowing down or refusing content coming from competitors, or, for that matter, from subscribers who want to be their own broadcasters.²⁹ Broadband companies may seek to provide "walled gardens" or "managed content areas" which limit consumer access to that of the company's proprietary network and its approved content partners.³⁰ Broadband companies may attempt to control the end

²⁹ See LESSIG, *THE FUTURE OF IDEAS*, *supra* note 17, at 156–58 (quoting Jerome Saltzer, "Open Access" is Just the Tip of the Iceberg (Oct. 22, 1999), at <http://web.mit.edu/Saltzer/www/publications/openaccess.html> (last visited Oct. 20, 2003) (offering examples of gatekeeping by cable networks)).

³⁰ See Hernan Galperin & Francois Bar, *The Regulation of Interactive Television in the United States and the European Union*, 55 FED. COMM. L.J. 61, 62–64, 69–72 (2002) (discussing strategy of walled gardens in interactive television services); Daniel L. Rubinfeld & Hal J. Singer, *Open Access to Broadband Networks: A Case Study of the AOL/Time*

user's Internet experience by creating what Cisco Systems has called "captive portals," which, in the company's own words, give a cable system owner "the ability to advertise services, build its brand, and own the user experience."³¹ The purpose of these innovations is to guide the end user into a continuous series of offers to consume goods and services from which the Internet access provider will glean profits. Through skillful control of the distribution network, access providers can determine who gets to see what programming and under what terms. The goal is not simple ideological censorship but diversion of end users into ever new consumption possibilities. Access providers seek to cocoon their customers, offering continuous promotion of brands and shopping possibilities while the end user surfs the Internet.

Here we can see a second aspect of the social conflict brought about by technological innovation. New telecommunications networks allow ordinary people to communicate with vast numbers of fellow human beings, routing around existing media gatekeepers and offering competing content. People are no longer simply consumers of prepackaged content from mass media companies that are controlled by a limited number of speakers. Instead, people can use the new telecommunications networks to become active participants in the production of public culture. But the very same technologies that offer these possibilities also offer media companies ever new ways to advertise, sell products, and push their favored content. Thus, just as in the case of intellectual property, businesses that control telecommunications networks will seek to limit forms of participation and cultural innovation that are inconsistent with their economic interests. Once again, the goal is not necessarily censorship of unpopular ideas but rather diversion and co-optation of audience attention. Businesses want to direct the Internet user toward increased consumption of their own goods and services as well as the products of their advertising partners. Recognizing that there is money to be made in advertising, sales, and delivery of content, telecommunications companies do not want to be pure conduits for the speech of others, and they do not want too much content competition from their customers. Instead, they want to use the architecture of the Internet to nudge their customers into planned communities of consumerist experience,

Warner Merger, 16 BERKELEY TECH. L.J. 631, 656 (2001) (noting dangers of conduit discrimination as well as content discrimination).

³¹ Data Sheet, Cisco 6400 Service Selection Gateway, at http://www.cisco.com/warp/public/cc/pd/as/6400/prodlit/c6510_ds.htm (last visited Oct. 20, 2003); see also Jeffrey A. Chester, *Web Behind Walls*, TECH. REV., June 2001, at 94, 94, available at <http://www.democraticmedia.org/resources/articles/webbehindwalls.html> (last visited Oct. 20, 2003).

to shelter end users into a world that combines everyday activities of communication seamlessly with consumption and entertainment. In some respects, businesses seek to push consumers back into their pre-Internet roles as relatively passive recipients of mass media content. In other respects, however, they openly encourage interactivity, but interactivity on their terms—the sort of interactivity that facilitates or encourages the purchase of goods and services.

Another way of seeing the social “contradiction” created by the Internet is through the concept of “public” space. Is the Internet a private space or a public space? Digital communications networks are held in private hands, increasingly by large media conglomerates who also hold interests in digital content production and who wish to sell their own goods and services and advertise the goods and services of others. From their perspective, the “publicness” of digital communications networks is merely a side effect of the use of private property by private actors. Because digital communications networks are privately owned, those who own them have the right to structure entry to and use of the network by other private actors. Rather than vindicating free speech values, regulating digital communications networks violates the free speech rights of telecommunications companies.

On the other hand, digital communications networks are “public” in the sense that the public uses them as a space for general interaction. The information superhighway is a public highway used by the public for public communication, debate, gossip, and every possible form of exchange of information. Digital communications networks are also “public” in the sense that their value as networks arises from public participation that produces network effects: Communications networks are valuable to individuals because the public in general uses them, and the larger share of the public that uses the network, the more valuable the network becomes. In other words, a key source of value of the communications network is its publicness, the fact that its inhabitants and its users are the public at large. Because digital communications networks serve a public function and because they gain their value from public participation, the argument goes, digital communications networks should be regulated to serve the public interest and to allow members of the public to use them as public spaces for communication, cultural innovation and public participation. Without such regulation, powerful private interests will trample on free speech values in the relentless pursuit of profits.

IV

FREEDOM OF SPEECH IN THE SECOND GILDED AGE

Let me summarize the argument so far: Technological innovations in the digital age have produced conflicts about the meaning of free expression in two different locations. The first is the scope of intellectual property; the second is the regulation of telecommunications networks. The conflict over freedom of speech looks quite different in these two areas. In intellectual property, media corporations have pushed for ever-greater protection of intellectual property through both legal and technological means. They have rejected complaints that ever-expanding intellectual property rights and digital rights management schemes inhibit freedom of expression because they eliminate fair use and shrink the public domain. In telecommunications regulation, by contrast, media corporations have aggressively pushed for expansion of free speech rights, arguing that the right to free speech includes the right to control communications networks. Invoking a property-based theory of free expression, they have rejected arguments that public regulation is necessary to keep conduits open and freely available to a wide variety of speakers.

Thus, in the digital age, media corporations have interpreted the free speech principle broadly to combat regulation of digital networks and narrowly in order to protect and expand their intellectual property rights. What is more, courts increasingly have begun to agree with these two positions.³²

These positions seem inconsistent on their face. In fact, they are not. They reflect a more basic agenda: It is not the promotion and protection of freedom of speech per se, but the promotion and protection of the property rights of media corporations. Both intellectual property and freedom of speech have been reconceptualized to defend capital investments by media corporations. Intellectual property rights, paracopyright, and digital rights management are justified as necessary to protect property rights and maintain a fair return on investment. Freedom of speech increasingly is being reinterpreted as the right to be free from economic regulation of digital communications networks. This is part of a larger trend of the past twenty-five

³² See *Eldred v. Reno*, 239 F.3d 372, 380 (D.C. Cir. 2000), *aff'd sub nom.* *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003) (holding that First Amendment poses no obstacle to Congressional extension of copyright terms that shrink scope of public domain, even when extension is retroactive); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000) (upholding constitutionality of application of Digital Millennium Copyright Act to DeCSS and enjoining linking to websites from which DeCSS might be obtained), *aff'd sub nom.* *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2001); *supra* note 26 (citing additional cases).

years, in which businesses have also used the First Amendment to attack restrictions on advertising and campaign finance.³³ We are just beginning to see the First Amendment invoked to defend the accumulation and sale of consumer data against government regulation.³⁴ One of the most important developments of the past quarter century is the emergence of the First Amendment and the free speech principle as anti-regulatory tools for corporate counsel.³⁵ At the same time, intellectual property, paracopyright, and digital rights management are being invoked not only to restrict cultural experimentation and innovation, but to control how ordinary individuals experience the Internet.³⁶ What these positions have in common is not a libertarian impulse, but a desire for greater control over how individuals will be permitted to use digital networks and digital content; which is to say, it is a desire for control over the very technologies that had created new possibilities for individual freedom and cultural innovation in the digital age.

In a sense, this development was inevitable. In the world in which we live, intellectual property and control of digital communications networks are increasingly important sources of wealth. The defense of those forms of wealth must find a legal manifestation. Intellectual property and freedom of speech serve these functions admirably.

We have been through this before. Jacksonian and abolitionist ideas before the Civil War produced a constitutional vision of free labor and free contract. This constitutional vision celebrated the right of ordinary individuals to own their labor. Laissez-faire was defended as a means of keeping government from giving special benefits to the wealthy. As America industrialized, corporations took up these Jacksonian and abolitionist ideas and reinterpreted them, transforming them into defenses of corporate property rights and constitutional attacks on government regulation of employment conditions.

³³ See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 375–87 (noting “ideological drift” of free speech principle to protect property and corporate interests).

³⁴ See, e.g., *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1235, 1239 (10th Cir. 1999) (invalidating, on First Amendment grounds, FCC regulations protecting privacy and sale of telephone customers’ personal information). On some of the problems faced in squaring consumer privacy with a libertarian conception of freedom of speech, see Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000).

³⁵ Balkin, *supra* note 33, at 384; Mark Tushnet, *Corporations and Free Speech*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 253 (David Kairys ed., 1982); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1386–92 (1984).

³⁶ LESSIG, *THE FUTURE OF IDEAS*, *supra* note 17, at 196–202; Elkin-Koren, *supra* note 25, at 84–85, 88–98.

Courts issued labor injunctions against union organizing on the grounds that allowing workers to form unions undermined the value of employer investments in capital.³⁷ Courts turned the ideology of free labor into a constitutional principle of liberty of contract that prevented governments from regulating wages and working conditions.³⁸

In what Clinton Rossiter called the "Great Train Robbery of Intellectual History,"³⁹ laissez-faire conservatives appropriated the words and symbols of early nineteenth-century liberalism—liberty, opportunity, progress, and individualism—and gave them an economic reinterpretation that served corporate interests.⁴⁰ They massaged and refitted the existing rhetoric of free labor and the right of ordinary citizens to pursue a calling into a sophisticated defense of corporate power and privilege that smashed labor unions, protected sweatshops, and eviscerated health and safety laws.⁴¹ By the turn of the twentieth century, the best legal minds that money could buy had reshaped the liberal rights rhetoric of the 1830s into a powerful conservative defense of property that they claimed was the rightful heir to the best American traditions of individualism and personal freedom.

A similar transvaluation of values is overtaking the free speech principle today.⁴² The right to speak has been recast as a right to be free from business regulation. Copyright is slowly being converted to property simpliciter with virtually perpetual terms; trademark and patent have steadily grown in scope; and database protection, already

³⁷ Cf. *Truax v. Corrigan*, 257 U.S. 312, 328 (1921) (holding that attempt to ban labor injunctions violated property rights of business owner).

³⁸ A substantial literature has developed explaining how Gilded Age ideas of freedom of contract were created out of Jacksonian and free labor ideals. See, e.g., Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 798–99 (1985); Charles W. McCurdy, *The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867–1937*, 1984 YEARBOOK OF THE SUPREME COURT HISTORICAL SOCIETY 20. Revisions of this view have suggested that other influences were also at work, see Stephen A. Siegel, *The Revision Thickens*, 20 LAW & HIST. REV. 631 (2002), but have not undermined the basic point that corporate interests made ample use of these rhetorical resources.

³⁹ CLINTON ROSSITER, *CONSERVATISM IN AMERICA* 128 (2d ed. rev. 1962).

⁴⁰ *Id.* at 128–62; see Balkin, *supra* note 33, at 383–87.

⁴¹ See generally ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887–1895* (1960); BENJAMIN R. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT* (1942).

⁴² The comparison between the ideological drift of the principles of freedom of contract and freedom of speech is explored in Balkin, *supra* note 33, at 375–87, and J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869 (1993).

extant in the European Union,⁴³ is on the horizon in the United States.⁴⁴ Indeed, in some respects, digital rights management and paracopyright offer copyrighted works even greater protection than ordinary property receives.⁴⁵ Intellectual property, which was originally viewed as a limited government monopoly designed to encourage innovation, has been transformed into a bulwark against innovation, facilitating control over digital content and limiting the speech of others.

We are living through a Second Gilded Age, which, like the first Gilded Age, comes complete with its own reconstruction of the meaning of liberty and property.⁴⁶ Freedom of speech is becoming a

⁴³ Council Directive 96/9, 1996 O.J. (L 77/20) (providing for legal protection of databases which, "by reason of the selection or arrangements of their contents, constitute[] the author's own intellectual creation").

⁴⁴ For a discussion of recent attempts, see Dov S. Greenbaum, *The Database Debate: In Support of an Inequitable Solution*, 13 ALB. L.J. SCI. & TECH. 431, 468–78 (2003).

⁴⁵ Cf. Randal C. Picker, *From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright*, 70 U. CHI. L. REV. 281, 293–96 (2003) (noting that digital rights management permits perfection of continuing control over use of intellectual property in digital content even after media product has been purchased).

⁴⁶ Or, in Julie Cohen's memorable phrase, we are entering the era of "*Lochner* in Cyberspace." Julie Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462 (1998).

Paul Schwartz and William Treanor argue, by contrast, that calls for constitutional limitations on the expansion of intellectual property are the best analogy to the laissez-faire constitutional conservatism of the Gilded Age; they compare arguments for constitutional protection of the public domain to *Lochner v. New York*, 198 U.S. 45 (1905). Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2334–35, 2394–95, 2411 (2003). They fail to consider the social and economic context in which the debate over laissez-faire conservatism occurred. In effect, Schwartz and Treanor argue that small-scale artists, software programmers, Internet end users, and consumers who seek a robust public domain are the functional equivalent of the Robber Barons and concentrated economic interests of the Gilded Age, while today's media corporations like Microsoft, Disney and Viacom are the functional equivalent of immigrant laborers in sweatshops at the turn of the century.

Because they focus exclusively on arguments about the scope of the Copyright Clause, and pay no attention to telecommunications law, Schwartz and Treanor do not recognize that the free speech principle is the key battleground for the legal protection of capital in the information economy. Opposition to the Copyright Term Extension Act turned precisely on the fact that the political economy of the information age blurs distinctions between regulations of speech and regulations of business practices in media corporations, and that ever-expanding property rights in patent, trademark, and copyright adversely affect freedom of expression. See Brief of Jack M. Balkin et al. as Amici Curiae in Support of the Petition at 15–21, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618), available at 2002 WL 1041899.

Much more troubling than the Court's conclusions about the Copyright Clause in *Eldred* is its cavalier dismissal of the important free speech interests in limited copyright terms. See *Eldred*, 537 U.S. at 218–22. From this perspective, *Eldred* most closely resembles not *Lochner v. New York*, but the early twentieth-century cases *Schenck v. United States*, 249 U.S. 47 (1919), *Abrams v. United States*, 250 U.S. 616 (1919), and *Gillow v. New*

generalized right against economic regulation of the information industries. Property is becoming the right of the information industries to control how ordinary people use digital content. We can no more capitulate to the Second Gilded Age's construction of these ideas than to the constructions offered in the first Gilded Age. We must offer a critical alternative to this construction, much as progressive thinkers did a century ago.

V

THE PROGRESSIVIST THEORY AND ITS LIMITATIONS

So far, I have explained how digital technologies have changed the social conditions in which speech is produced, and I have described the way that the information industries have attempted to reinterpret freedom of speech. These reinterpretations reflect the interests of businesses attempting to secure certain privileges in a changing economy. They are by no means necessary or inevitable, and indeed, I think that they are in many respects mistaken.

There is a better way to understand the free speech principle in the digital era. The alternative is a theory of freedom of speech based on the idea of a democratic culture. In order to explain this alternative, I would like to retrace my steps and think about how free speech theory dealt with the last great technological change, the rise of broadcast media.

Probably the most important theoretical approach to freedom of speech in the twentieth century has argued that freedom of speech is valuable because it preserves and promotes democracy and democratic self-government. The notion that there is an important connection between freedom of speech and democracy is hardly new—people have understood the connection for as long as democracies have been around. But the twentieth century produced a special

York, 268 U.S. 652 (1925), in which the Court rejected free speech claims and exercised judicial restraint. The danger is that an unrestrained legislature beholden to media interests will continually ramp up intellectual property protections at the expense of the free speech interests of others.

Schwartz and Treanor note the argument that the expansion of intellectual property arises from rent-seeking by media corporations that have corrupted the political process. Schwartz & Treanor, *supra*, at 2406. However, failing to recognize the First Amendment interests involved, they assume that the only issue is the adjustment of property rights between competing stakeholders. They argue that the defects of political process, even if serious, cannot justify heightened judicial review, *see* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), because the theory of process protection should not apply to ordinary economic and social legislation but only to “the representation of minorities.” Schwartz & Treanor, *supra*, at 2407. Perhaps tellingly, they omit the *Carolene Products* Court’s argument that the theory of process protection is equally concerned with securing freedom of speech.

emphasis on that connection, and during the course of the twentieth century, many thinkers claimed that the very purpose of freedom of speech was not so much to promote individual autonomy or personal fulfillment as to promote democratic deliberation about public issues. We can find the beginnings of this idea in Progressive Era thinkers in the first two decades of the twentieth century.⁴⁷ The most famous statement is by the philosopher of education Alexander Meiklejohn,⁴⁸ and his approach has greatly influenced later theorists.⁴⁹

As a shorthand, I will call the democracy-based approach of Meiklejohn and his followers the “republican” or “progressivist” approach. That is because a focus on democratic deliberation rather than individual autonomy is characteristic of republican political theory, and it is also characteristic of much thinking in the Progressive Era in the United States.⁵⁰ Progressivism is a sensibility, an attitude about what democracy is and what wise government can do. The progressive has faith in government’s ability to promote the public

⁴⁷ See MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* 92–93, 122–26 (1991) (noting rise of democratic conception in Progressive period and discussing democratic elements in Zechariah Chafee, Jr.’s theory of free expression); David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951, 954–88 (1996) (discussing free speech theories of early twentieth-century progressive thinkers, including John Dewey and Herbert Croly).

⁴⁸ See generally ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960) [hereinafter MEIKLEJOHN, *POLITICAL FREEDOM*]; Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 [hereinafter Meiklejohn, *First Amendment*].

⁴⁹ See, e.g., OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996) [hereinafter FISS, *THE IRONY OF FREE SPEECH*]; CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986) [hereinafter Fiss, *Free Speech and Social Structure*]; Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987) [hereinafter Fiss, *Why the State?*]; Harry Kalven, *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191. Fiss well describes the centrality of this theory in twentieth-century legal thought:

The theory that animates this protection [of the speaker’s autonomy], and that inspired Kalven, and before him Meiklejohn, and that now dominates the field, casts the underlying purpose of the first amendment in social or political terms: The purpose of free speech is not individual self-actualization, but rather the preservation of democracy, and the right of a people, as a people, to decide what kind of life it wishes to live. Autonomy is protected not because of its intrinsic value, as a Kantian might insist, but rather as a means or instrument of collective self-determination. We allow people to speak so others can vote. Speech allows people to vote intelligently and freely, aware of all the options and in possession of all the relevant information.

Fiss, *Free Speech and Social Structure*, *supra*, at 1409–10.

⁵⁰ On the connections between democratic free speech theory and republicanism, see BAKER, *supra* note 9, at 126–27, 138–43, 152–53, 170–76. On the connection to the thought of the Progressive Era, see GRABER, *supra* note 47, at 75–121; Balkin, *supra* note 2, at 1947–48, 1956–58; Rabban, *supra* note 47.

interest through rational deliberation, works to structure government and public decisionmaking to promote deliberation and consensus about important public policy issues, worships expertise, and views popular attitudes and popular culture with suspicion because they tend to be emotional, parochial, irrational, untutored, and in need of channeling, refinement, and education.⁵¹

I think it is no accident that the progressivist/republican approach to free speech arose in the twentieth century, for this was also the century of mass media. People who endorse democratic theories of free speech understand that although mass media can greatly benefit democracy, there is also a serious potential conflict between mass media and democratic self-governance. The reason is that mass media are held by a comparatively few people, and their ownership gives this relatively small group enormous power to shape public discourse and public debate. The danger is that they will use their dominant position in three equally worrisome ways.

The first worry is that the people who control mass media will skew coverage of public issues to promote views that they support. In a world where ownership of mass media is concentrated in the hands of a relatively few very wealthy individuals and corporate conglomerates, the agendas and concerns of the wealthy will prevail, constricting discussion of serious issues and serious alternatives to the status quo. As a result, people will get disinformation or a skewed picture of the world around them, and this will be harmful for democracy.

The second worry is that mass media will omit important information, issues, and positions that the public should take into account. As a result, people will be exposed to only a limited set of issues to deliberate about, and to only a limited number of ways of thinking about and dealing with this limited set of issues.

The third worry is that mass media will reduce the quality of public discourse in the drive for higher ratings and the advertising revenues and other profits that come with them. Mass media will oversimplify and dumb down discussions of public issues, substitute sensationalism and amusement for deliberation about public questions, and transform news and politics into forms of entertainment and spectacle. The endless drive for advertising revenues and profits tends to drive out serious discourse and replaces it with mind-numbing entertainment. This demobilizes the public, leaving them less and less interested in focusing on important public issues of the day.

For these three reasons, democracy-based theorists of free speech in the twentieth century have argued that government must regulate

⁵¹ Balkin, *supra* note 2, at 1947–48, 1956–58.

the mass media in a number of different ways: (1) by restricting and preventing media concentration; (2) by imposing public-interest obligations that require the broadcast media to include programming that covers public issues and covers them fairly; and (3) by requiring the broadcast media to grant access to a more diverse and wide-ranging group of speakers in order to expand the agenda of public discussion.

The progressivist/republican approach is an important counterweight to a market-oriented approach to freedom of speech that ties speech rights closely to ownership of property. I mentioned this approach in my discussion of telecommunications policy in the digital age, but of course, the argument that people who own telecommunications media should be free of government regulation predates the Internet. Indeed, the new market-based arguments are simply logical continuations of arguments for deregulation of the broadcast media that have been going on for many years.⁵² The Internet has simply given media corporations a new justification for using the free speech principle as an anti-regulatory tool: Because people do not need access to the mass media to speak, governments have lost their greatest justification for mass media regulation.

However, we cannot expect that the Internet will adequately compensate for any loss in media diversity that might come from deregulation, elimination of public interest obligations, and increased media concentration. First, market concentration in mass media is not unrelated to market concentration in cable and broadband ownership. Many of the same companies that have gobbled up an increasingly large share of mass media markets also have control over cable companies and broadband companies. As we have seen, these companies have interests in eliminating competition and controlling the Internet experience of end users. So increased media concentration may actually exacerbate or dovetail with loss of end-user autonomy on the Internet. Second, the quality and diversity of information that flows over the Internet is inevitably shaped by the quality and diversity of information available in broadcast media and cable, because that is where a very large number of people still get most of their news and information. If more traditional mass media provide disinformation, constrict agendas of public discussion, displace discussion of public issues, and demobilize audiences, Internet speech can only partially compensate. We cannot view the Internet as a complete substitute for mass media. Instead, Internet speech is layered on top of the forms of

⁵² See, e.g., Mark S. Fowler & David L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207 (1982) (arguing for repeal of most forms of broadcast regulation).

public discourse and discussion that cable and broadcast media provide. This follows from my argument that speech on the Internet routes around and gloms onto the products of the mass media. The mass media remain a central substrate on which Internet speech builds.

Nevertheless, the Internet does make a difference to freedom of speech. The digital age exposes weaknesses and limitations in democracy-based theories of free speech, just not the ones with which the capitalist approach is concerned.

Progressivist and republican approaches arose in response to the challenge to democracy posed by mass media. And their limitations arise from the same set of concerns. The progressivist/republican approach is limited in three important respects. First, it emphasizes political questions and deliberation about public issues over other forms of speech. It tends to value other kinds of speech to the extent that they contribute to public discussion of political questions rather than for their own sake. Second, for the same reason, the progressivist/republican approach tends to downplay the importance of popular culture, too often seeing it as ill-informed and a distraction from serious issues. Third, because its paradigmatic concern is broadcast media held by a relatively small number of people, who may misuse their power to control the public agenda or demobilize the citizenry, the progressivist/republican approach tends to downplay the centrality of liberty and personal autonomy to freedom of speech.⁵³ It focuses instead on equality and on the production of a suitable agenda for public discussion. In Meiklejohn's famous phrase, the point of freedom of speech is not that everyone shall speak, but that "everything worth saying shall be said."⁵⁴

The progressivist/republican argument that we should not tie the right of free speech too closely to the right of private property remains valid, particularly in an age of increasing media concentration. That is because the liberty of speech and the liberties involved in property ownership are two different kinds of freedom. Although property rights often assist free expression—think of the right to use the

⁵³ Meiklejohn was perhaps most overt about this, arguing that the First Amendment "has no concern about the 'needs of many men to express their opinions'" but rather is concerned with "the common needs of all the members of the body politic." MEIKLEJOHN, *POLITICAL FREEDOM*, *supra* note 48, at 55; *see also id.* at 56–57, 61 (criticizing Zechariah Chafee, Jr. for being "misled by his inclusion of an individual interest within the scope of the First Amendment," and Justice Oliver Wendell Holmes for his "excessive individualism"). Owen Fiss, likewise, has emphasized that the First Amendment's concern with autonomy is primarily instrumental: "Autonomy may be protected, but only when it enriches public debate." Fiss, *Why the State?*, *supra* note 49, at 786.

⁵⁴ MEIKLEJOHN, *POLITICAL FREEDOM*, *supra* note 48, at 26.

software and the computer that one owns—they can also undermine it, as suggested by the examples of content discrimination in telecommunications networks and the use of digital rights management to control the end user's experience.

Nevertheless, the paradigm case that motivates the progressivist agenda—the case of few speakers broadcasting to a largely inactive mass audience—no longer describes the world we live in. Even if, as I have argued, the new digital technologies do not displace mass media, they exist alongside it and build on top of it. Digital technologies give lots of people, more than ever before, a chance to participate in the creation and development of public culture. Technological changes in how speech is transmitted, and in who gets to participate in that transmission, change the focus of free speech theory.

VI

THE IDEA OF A DEMOCRATIC CULTURE

Let me begin by pointing to five characteristics of Internet speech that I believe are exemplary of freedom of speech generally. These characteristics are hardly new to the Internet; rather, my point is that the Internet makes them particularly salient. That salience, I shall argue, reshapes our conception of the free speech principle.

First, speech on the Internet ranges over every possible subject and mode of expression, including the serious, the frivolous, the gossipy, the erotic, the scatological, and the profound. The Internet reflects popular tastes, popular culture, and popular enthusiasms.

Second, the Internet, taken as a whole, is full of innovation. The tremendous growth of the Internet in a relatively short period of time shows how enormously creative ordinary people can be if given the chance to express themselves. And it demonstrates what ordinary people can do when they are allowed to be active producers rather than passive recipients of their cultural world.

Third, much of the source of that creativity is the ability to build on something else. This is particularly true of the World Wide Web. As originally conceived, the very structure of HTML code encourages copying, imitation, and linking. The continual innovation and transformation we see in digital media stems directly from their ability to use the old to make the new. Digital media allow lots of people to comment, absorb, appropriate, and innovate—to add a wrinkle here, a criticism there. Internet speech continually develops through linkage, collage, annotation, mixture, and through what I have called routing around and glomming on. Internet speech, like all speech, appropriates and transforms. It imitates, copies, builds upon and mixes.

Fourth, Internet speech is participatory and interactive. People don't merely watch (or listen to) the Internet as if it were television or radio. Rather, they surf through it, they program on it, they publish to it, they write comments and continually add things to it. Internet speech is a social activity that involves exchange, give and take. The roles of reader and writer, producer and consumer of information are blurred and often effectively merge.

Fifth, and finally, because Internet speech is a social activity, a matter of interactivity, of give and take, it is not surprising that Internet speech creates new communities, cultures and subcultures. In this way, it exemplifies an important general feature of freedom of speech: Freedom of speech allows us, each of us, to participate in the growth and development of the cultures and subcultures that, in turn, help constitute us as individuals. Freedom of speech is part of an interactive cycle of social exchange, social participation, and self-formation. We speak and we listen, we send out and we take in. As we do this, we change, we grow, we become something other than we were before, and we make something new out of what existed before.

To sum up, the Internet makes particularly salient five facts about free speech: Speech ranges over a wide variety of subjects, including not only politics but also popular culture. The speech of ordinary people is full of innovation and creativity. That creativity comes from building on what has come before. Speech is participatory and interactive as opposed to mere receipt of information. It merges the activities of reading and writing, of production and consumption. Finally, speech involves cultural participation and self-formation. The Internet reminds us how central and important these features are to speech generally. It reveals to us in a new way what has always been the case.

And this brings me to a central point: The populist nature of freedom of speech, its creativity, its interactivity, its importance for community and self-formation, all suggest that a theory of freedom of speech centered around government and democratic deliberation about public issues is far too limited. The free speech principle has always been about something larger than democracy in the narrow sense of voting and elections, something larger even than democracy in the sense of public deliberation about issues of public concern. If free speech is about democracy, it is about democracy in the widest possible sense, not merely at the level of governance, or at the level of deliberation, but at the level of culture. The Internet teaches us that the free speech principle is about, and always has been about, the promotion and development of a democratic culture.

Democracy is far more than a set of procedures for resolving disputes. It is a feature of social life and a form of social organization. Democratic ideals require a further commitment to democratic forms of social structure and social organization, a commitment to social as well as political equality.⁵⁵ And the forces of democratization operate not only through regular elections, but through changes in institutions, practices, customs, mannerisms, speech, and dress. A “democratic” culture, then, means much more than democracy as a form of self-governance. It means democracy as a form of social life in which unjust barriers of rank and privilege are dissolved, and in which ordinary people gain a greater say over the institutions and practices that shape them and their futures.

What makes a culture democratic, then, is not democratic *governance* but democratic *participation*. A democratic culture includes the institutions of representative democracy, but it also exists beyond them, and, indeed undergirds them. A democratic culture is the culture of a democratized society; a democratic culture is a participatory culture.

If the purpose of freedom of speech is to realize a democratic culture, why is democratic cultural participation important? First, culture is a source of the self. Human beings are made out of culture. A democratic culture is valuable because it gives ordinary people a fair opportunity to participate in the creation and evolution of the processes of meaning-making that shape them and become part of them; a democratic culture is valuable because it gives ordinary people a say in the progress and development of the cultural forces that in turn produce them.

Second, participation in culture has a constitutive or performative value: When people are creative, when they make new things out of old things, when they become producers of their culture, they exercise and perform their freedom and become the sort of people who are free. That freedom is something more than just choosing which cultural products to purchase and consume; the freedom to create is an active engagement with the world.⁵⁶

⁵⁵ On the social features of democracy implicit in the idea of a democratic culture, see J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2314 (1997); J.M. Balkin, *The Declaration and the Promise of a Democratic Culture*, 4 WIDENER L. SYMP. J. 167 (1999).

⁵⁶ Legal scholars influenced by John Fiske have argued that intellectual property law should also serve the goals of promoting popular participation in culture, or what Fiske called “semiotic democracy.” See, e.g., William W. Fisher III, *Property and Contract on the Internet*, 73 CHI.-KENT L. REV. 1203, 1217 (1998) (“In an attractive society, all persons would be able to participate in the process of meaning-making. Instead of being merely passive consumers of cultural artifacts produced by others, they would be producers, helping to shape the world of ideas and symbols in which they live.”); see also Kenneth

By "culture" I mean the collective processes of meaning-making in a society. The realm of culture, however, is much broader than the concern of the First Amendment or the free speech principle. Armaments and shampoo are part of culture; so too are murder and robbery. And all of these things can affect people's lives and shape who they are. The realm of culture for purposes of the free speech principle is a subset of what anthropologists study as forms of culture. It refers to a set of historically contingent and historically produced social practices and media that human beings employ to exchange ideas and share opinions.⁵⁷ These are the methods, practices, and technologies through which dialogue occurs and public opinion is formed. For example, today people generally regard art as a social

Karst, *Local Discourse and the Social Issues*, 12 CARDOZO STUD. L. & LIT. 1, 27 (2000) (defining cultural democracy as "the broadest possible participation in the cultural processes that define and redefine the sort of society we shall be"). Larry Lessig's recent call for "free culture," see LESSIG, *THE FUTURE OF IDEAS*, *supra* note 17, at 9–10, also has important connections to the principles of semiotic democracy and democratic culture, as does David Lange's notion of free appropriation as a right of citizenship exercised in the public domain, see David Lange, *Reimagining the Public Domain*, 66 LAW & CONTEMP. PROBS. 463, 475–83 (2003).

Important examples of this trend in intellectual property scholarship include Rosemary J. Coombe, *Authorizing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L.J. 365 (1992); Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991); Rosemary J. Coombe, *Publicity Rights and Political Aspiration: Mass Culture, Gender Identity, and Democracy*, 26 NEW ENG. L. REV. 1221 (1992); Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397 (1990); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 272–73 (1996); David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, 55 LAW & CONTEMP. PROBS. 139 (1992); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990); Madow, *supra* note 2; William Fisher, *Theories of Intellectual Property*, at http://www.law.harvard.edu/Academic_Affairs/coursepages/tfisher/iptheory.html (last visited Dec. 3, 2003).

Other scholars have sought to connect the proper scope of copyright, fair use and the public domain to the promotion of democracy in the sense of public discussion of public issues. See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 347–65 (1996) [hereinafter Netanel, *Copyright and a Democratic Civil Society*] (arguing that copyright promotes democracy by funding independent sectors of creativity); Neil Weinstock Netanel, *Market Hierarchy and Copyright in Our System of Free Expression*, 53 VAND. L. REV. 1879 (2000). This strand of intellectual property scholarship is somewhat closer to the republican or progressivist model; it emphasizes the importance of democratic public discourse and views popular culture as valuable to the extent that it contributes to a democratic civil society. See Netanel, *Copyright and a Democratic Civil Society*, *supra*, at 351 n.310.

⁵⁷ For a helpful discussion, see Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1253–55 (1995). Post argues that social practices and media for the communication of ideas are central to the formation of public opinion. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2367–69 (2000); Post, *Recuperating First Amendment Doctrine*, *supra*, at 1275–77.

practice for the exchange of ideas, and they regard motion pictures as a medium of expression.⁵⁸ These practices and media of social communication construct the realm that we regard as “speech” for purposes of the free speech principle.⁵⁹ We cannot give an exhaustive list of these practices and media precisely because the social conventions and technologies that define them are always evolving; even so, it seems clear enough that the Internet and other digital technologies are media for the communication of ideas, and an increasingly important way for people to express their ideas and form their opinions.⁶⁰ They are central—and I would say crucial—media for the realization of a democratic culture.

Culture has always been produced through popular participation. Digital technology simply makes this aspect of democratic life more obvious, more salient. Radio and television are technologies of mass cultural reception, where a few speakers can reach audiences of indefinite size. But the Internet is a technology of mass cultural participation in which audiences can give as well as receive, broadcast as well as absorb, create and contribute as well as consume. Digital technology makes the values of a democratic culture salient to us because it offers the technological possibility of widespread cultural participation.

What is the difference between grounding freedom of speech on the promotion of democracy and grounding it on the promotion of a democratic culture? What is at stake in the move to culture?

There are three important differences, I think, and each stems from the weaknesses of the progressivist/republican model: They con-

⁵⁸ It was not always thus. See Post, *Recuperating First Amendment Doctrine*, *supra* note 57, at 1252–53 (discussing *Mutual Film Corp. v. Industrial Comm.*, 236 U.S. 230, 243–45 (1915), in which Supreme Court originally held that motion pictures were not “organs of public opinion”). By 1952, the Supreme Court had come around, stating that “it cannot be doubted that motion pictures are a significant medium for the communication of ideas.” *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). The difference between the Court’s statements in 1915 and 1952 reflects important changes in American society to which the Court’s First Amendment doctrines eventually responded. The scope of the free speech principle always grows out of a normatively inflected recognition of sociological realities.

⁵⁹ The free speech principle also applies to regulations of conduct that do not involve a generally recognized medium for the communication of ideas when the government regulates conduct because it disagrees with or desires to suppress the ideas it believes the conduct expresses. See *United States v. O’Brien*, 391 U.S. 367, 377–78 (1968) (holding that reasons for regulation of conduct must be unrelated to suppression of free expression). Thus, when government effectively treats conduct as a medium for the communication of ideas and punishes it on that basis, the free speech principle is also implicated.

⁶⁰ See, e.g., *Reno v. ACLU*, 521 U.S. 844, 850 (1997) (“The Internet is ‘a unique and wholly new medium of worldwide human communication.’” (quoting *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996))).

cern the status of nonpolitical expression, the role of popular culture, and the importance of individual participation and individual liberty.

A. *Nonpolitical Expression*

A serious difficulty with the progressivist/republican model has always been that a wide variety of activities, of which art and social commentary are only the most salient examples, have always fit poorly into a democratic theory of free expression. Lots of speech is not overtly political. Nevertheless, it gets protected under the progressivist/republican model because it is useful for political discussion, because it may become enmeshed in political controversies (and thus threatened or suppressed for political reasons), or because it is very hard to draw lines separating what is political from what is not.⁶¹ In like fashion, lots of activities cannot easily be classified as deliberation—like singing, shouting, protesting, gossiping, making fun of people, or just annoying them or getting them angry. Nevertheless, these activities are protected because we can think of them as raw materials for further democratic deliberation or because we cannot easily draw lines separating them from the social practice of deliberation.⁶² In both cases, then, we have kinds of speech that are at the periphery rather than the core; we protect them in aid of something more central and precious. In short, the progressivist vision sees democratic deliberation about public issues at the core of constitutional concern and other subjects and other forms of expression as peripheral or supplementary.

⁶¹ Meiklejohn himself argued that works of art were protected speech because they promoted knowledge, sharpened intelligence, and developed sensitivity to human values, thus helping people to make political decisions. Meiklejohn, *First Amendment*, *supra* note 48, at 255–57. Other scholars have recognized that not all artistic expression equally promotes democratic self-government. See, e.g., SUNSTEIN, *supra* note 49, at 153–59 (1993) (suggesting that nonpolitical art should be relegated to lower tier of First Amendment protection). And of course Robert Bork, who also had a democracy-based theory of the First Amendment, famously argued that art should receive no First Amendment protection if it was not political speech. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26–28 (1971).

Owen Fiss believes, to the contrary, that art, particularly unorthodox art and art underappreciated by market forces, furthers the goals of collective self-determination and democratic deliberation. He argues that government programs like the National Endowment for the Arts (NEA) that subsidize art should look to art that is concerned with issues on the public agenda or that should be on the public agenda of discussion and comment. Thus, government subsidy of art should be designed to promote discussion of important public issues. FISS, *THE IRONY OF FREE SPEECH*, *supra* note 49, at 40–45.

⁶² Cf. Owen M. Fiss, *The Unruly Character of Politics*, 29 McGEORGE L. REV. 1, 2–7 (1997) (noting limitations of Meiklejohnian metaphor of town meeting as applied to confrontational politics).

I have never been satisfied with this approach. I think something is missing here, and the notion of democratic culture helps us understand why. The point of democracy, as its name implies, is to put power in the hands of the people, to give ordinary people some measure of control over the forces that shape their lives and some degree of say about how the world around them develops. But law and governance are only parts of this world. Culture is an even larger part, and in some ways it has an even more capacious role in structuring our lives. The various processes of communication and cultural exchange are the sources of the self and its development over time. Our ideas, our habits, our thoughts, our very selves are produced through constant communication and exchange with others.⁶³ The influence is reciprocal: Through this continuous communication and exchange, we shape culture and are shaped by it in turn. We absorb it, we inhabit it, we make it new. We send it out into the world, we make it part of us.

Culture is more than governance, more than politics, more than law. And if democracy is giving power to the people, then true democracy means allowing people not only to have a say about who represents them in a legislature, or what laws are passed, but also to have a say about the shape and growth of the culture that they live in and that is inevitably part of them. Power to the people—democracy—in its broadest, thickest sense, must include our relationship not simply to the state but to culture as a whole, to the processes of meaning-making that constitute us as individuals. Those processes of meaning-making include both the ability to distribute those meanings and the ability to receive them.⁶⁴

Culture is an essential ingredient of the self, and so freedom of speech means participation in the forces of culture that shape the self. We participate in the growth and development of culture through interaction, through communicating to others and receiving ideas from others. Cultural democracy is memetic democracy, the continuous distribution, circulation, and exchange of bits of culture from mind to mind.⁶⁵ This vision of culture is not democratic because

⁶³ On the formation of self through cultural transmission, see JACK M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 269–85 (1998).

⁶⁴ As Julie Cohen reminds us, digital technologies tend to blur the boundaries between production and reception, speaking and reading, or even between viewing and copying. See Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981, 1004–09 (1996); see also Rubinfeld, *supra* note 5, at 34–36 (arguing that theories of freedom of expression based in autonomy and self expression do not sufficiently account for First Amendment right to read as well as to express one's self).

⁶⁵ Memetics is an evolutionary theory that attempts to explain the development of culture through the transmission of bits of culture, or memes, which replicate themselves in

people are voting on what is in their culture. It is democratic because they get to participate in the meaning-making processes that form and reproduce culture. They do this through communicating with and interacting with others. Moreover, democratic culture is not democratic because people are participating in processes of deliberation about governance, or even public issues. Rather it is democratic because it is participation in the creation and shaping of culture, which is, at the same time, participation in the growth and development of the self.

B. Popular Culture

The second basic problem with the work of Meiklejohn and his heirs has been its relative neglect and suspicion of popular culture. Popular culture is often seen as mass culture controlled by corporations, which demobilizes the citizenry; as sensationalism or dumbed-down speech, which adds little of importance to democratic deliberation; or as mere entertainment, which distracts people from serious discussion of public issues.⁶⁶ But from the perspective of democratic culture, popular culture and entertainment should not be merely

human minds. The term "meme" was coined by the zoologist Richard Dawkins. See RICHARD DAWKINS, *THE SELFISH GENE* 189–94 (1977). Memetic theory often tends to undermine agency and selfhood, see, e.g., SUSAN BLACKMORE, *THE MEME MACHINE* (1999), and thus would seem an odd choice for a theory of self expression. But memetics can also be employed to explain concepts central to agency and selfhood like freedom, see DANIEL C. DENNETT, *FREEDOM EVOLVES* 175–92, 266 (2003), or the growth of human belief systems and human innovation, see BALKIN, *supra* note 63, at 42–97, 173–75.

The idea of memetic democracy emphasizes the deep connections between self and agency on the one hand, and cultural evolution and the shaping of the self through cultural exchange on the other. Memetic democracy means that everyone gets to participate in the distribution and dissemination of memes, which are the building blocks of the cultural software that constitutes individuals as individuals.

⁶⁶ See, e.g., LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 138–41 (1991) (contrasting burdens of education for civic life with pleasantness of entertainment); SUNSTEIN, *supra* note 49, at 84–91 (decrying "low quality" programming that appeals to tastes of uneducated); FISS, *Free Speech and Social Structure*, *supra* note 49, at 1413 ("From the perspective of a free and open debate, the choice between *Love Boat* and *Fantasy Island* is trivial."); FISS, *Why the State?*, *supra* note 49, at 788 (contrasting reruns of "I Love Lucy" and MTV with "the information [members of the electorate] need to make free and intelligent choices about government policy, the structure of government, or the nature of society."). Once again, this familiar progressivist theme is already present in Meiklejohn. See MEIKLEJOHN, *POLITICAL FREEDOM*, *supra* note 48, at 87 (attacking commercial radio for "corrupt[ing] both our morals and our intelligence"). Even Justice Louis Brandeis fell prey to this sort of cultural elitism, which pervades his famous call for protecting the right of privacy from a particular form of speech. See Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890) (arguing that "personal gossip," "[e]asy of comprehension [and] appealing to that weak side of human nature," "crowds the space available for matters of real interest to the community," and "destroys at once robustness of thought and delicacy of feeling").

peripheral or a distraction. They should be a central part of what freedom of speech is about.

In an age of unidirectional mass media, popular culture was, to a very large extent, mass culture—a set of commodities manufactured and sent out to be consumed by a mass audience. But the Internet allows mass culture to be appropriated by ordinary citizens and become, more than ever before, a truly popular culture, because it allows what I have called routing around and glomming on.⁶⁷

We can understand the controversies over intellectual property in this light. Media corporations are turning to digital rights management to avoid digital piracy. But much of what traditional mass media most fears and resents is not piracy but cultural appropriation—individual riffs on mass media digital products shared with others—and the ability of consumers to route around a controlled advertising and marketing environment. Shifting our focus from democracy to democratic culture helps us see that the problem in the digital age is not just deliberation about public issues. It is also the importance of letting ordinary people engage in appropriation and innovation rather than mere consumption; it is the value of ordinary people being able to “rip, mix, and burn,”⁶⁸ to route around traditional media gatekeepers and glom onto existing media products.

In a democratic culture, we are interested in protecting not only speech about public issues, but also speech that concerns popular expression in art, as well as cultural concerns such as gossip, mores, fashions, and popular music. The progressivist/republican approach has tended to valorize high culture and high quality programming as aids to democratic deliberation (often conflating the two in the pro-

⁶⁷ In this sense the Internet simply empowers the popular appropriation and transformation of mass culture that already existed:

Much of mass culture involves programming, advertisements, architecture, and artwork produced by corporations and designed to sell products and make money. Many critiques of mass culture warn of the deleterious consequences of consumerism and mass consumption. . . . But a populist view [of democratic culture] also emphasizes that ordinary people are not mere passive receptors of the messages offered in advertising, television programming, and other elements of contemporary mass culture. Such assumptions are just another way of denigrating the intelligence and abilities of ordinary people. People do not uncritically absorb and assimilate the images they see on the television screen—they process, discuss, and appropriate them. People are active interpreters and rearrangers of what they find in mass culture. They use the raw materials of mass culture to articulate and express their values. Through this process, they produce and reproduce popular culture.

Balkin, *supra* note 2, at 1948–49 (footnotes omitted).

⁶⁸ The reference is to Apple’s famous commercial instructing users of its iPod to “[R]ip, mix, and burn. . . . After all, it’s your music.” Larry Lessig uses the slogan as a metaphor for a free culture. LESSIG, *THE FUTURE OF IDEAS*, *supra* note 17, at 9–11.

cess), with “low” culture protected only as a peripheral concern.⁶⁹ But if freedom of speech is concerned with the promotion of a truly democratic culture, popular culture is every bit as important as so-called high culture.⁷⁰ In fact, in a democratic culture, the distinction between high culture and low culture begins to blur and the difference between them becomes increasingly difficult to maintain. High culture continually borrows from popular culture; moreover, as culture becomes increasingly democratized, the popular culture of today often turns out to be the high culture of tomorrow.

C. Individual Participation

A third problem with the progressivist/republican model has been its tendency to seek to manage discourse and structure public debate.⁷¹ This desire is hardly surprising: In a world dominated by mass media controlled by a relative handful of very wealthy corporations, it seems important to make sure that dissenting views get a word in edgewise, that serious issues are not driven out by the media’s never-ending quest for profits, and that audiences are not stultified and demobilized by an endless stream of increasingly vapid entertainment. As a result, the progressivist model has downplayed individual liberty and instead played up the protection of democratic processes, including robust debate on public issues and the creation of an informed citizenry. Earlier, I noted Meiklejohn’s famous statement that the point of freedom of speech is not that everyone shall speak, but that everything worth saying shall be said. Meiklejohn even analogized the system of free expression to a town meeting.⁷² The purpose of the town meeting was to shape a public agenda for discussion

⁶⁹ See SUNSTEIN, *supra* note 49, at 87–91; see also Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 518 (2000) (arguing that goal of television regulation is to promote deliberative democracy).

⁷⁰ See Balkin, *supra* note 2, at 1948 (“[P]opular culture is neither a debilitated version of democratic culture nor a mere diversion from the sober processes of deliberation imagined by progressivism. It is not a sideshow or distraction from democratic culture but the main event. Moreover, [a] populis[t] [approach to free expression] accepts, as progressivism does not, that popular culture—which is also democratic culture—is by nature unkempt and unruly, occasionally raucous and even vulgar. It is by turns both eloquent and mawkish, noble and embarrassing, wise and foolish, resistant to blandishments and gullible in the extreme. It is imperfect in precisely the same sense that democracy itself is imperfect.”).

⁷¹ Robert Post has emphasized this limitation of the Meiklejohn model, arguing that the autonomy of public discourse, necessary for democratic self-government, is undermined by imposing managerial methods to cabin its scope and agendas. See generally Robert Post, *Managing Deliberation: The Quandary of Democratic Dialogue*, 103 ETHICS 654 (1993); Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993).

⁷² MEIKLEJOHN, *POLITICAL FREEDOM*, *supra* note 48, at 24–27.

of serious issues; there would be time for only some people to speak. The important point was that the participants in the meeting be informed and stick to the agenda because everyone would decide what to do on the basis of the information presented. Although Meiklejohn's town meeting seems quite distant from the electronic mass media, it had many of the same features: scarcity of time, the need for a public agenda, and the importance of an informed citizenry. Hence the need for regulation was very much the same.

Democratic culture, by contrast, is not solely concerned with people's ability to be informed about a particular agenda. It is concerned with participation, interaction, and the ability of people to create, to innovate, to borrow ideas and make new ones. Meiklejohn remarked that his ideal town meeting was "self-government," not a "dialectical free-for-all."⁷³ That opposition may hold true for a particular form of democracy. But in a democratic culture, and especially the culture of the Internet, freedom of expression *is* a dialectical free-for-all, a continuous process of interactivity and innovation, in which culture and discussion move and grow in any number of different directions.

Here again a shift in focus from democracy to democratic culture responds to the sorts of freedoms that digital technologies make possible. Digital technologies and telecommunications networks mean that people are no longer forced into the role of mere spectators and consumers; they can be active participants, creating, commenting, and broadcasting their own ideas to a larger public. And in a world in which active participation in the creation and distribution of culture becomes possible for so many, liberty is an important good to be prized, valued, and nourished.

The progressivist/republican conception of free speech arose in the twentieth century because ordinary people were shut out of the most pervasive and important forms of speech and were reduced to the roles of spectators, consumers, and recipients. In that world, protecting the liberty of a favored few who owned the means of communication from regulation was less important than producing discussion on public issues and promoting a robust agenda of diverse and antagonistic sources so that the citizenry could be well-informed and engaged with the great public issues of the day. But new technologies make it possible for vast numbers of people to participate, innovate, and create, to route around and glom on to the traditional mass media and their products. This has increased enormously the practical liberty of the ordinary citizen to speak, and to reach a vast audience.

⁷³ *Id.* at 25.

When technology makes liberty possible, liberty once again must return to the forefront of concern.⁷⁴

The twentieth-century concern with speech as a method of democratic deliberation privileges the delivery of information about issues of public concern to the public, who receive this information through asymmetric and unidirectional mass media. I do not wish to deny the

⁷⁴ Indeed, the standard progressivist/republican arguments for regulation of broadcast, cable, and satellite can and should be rearticulated in terms of the more populist perspective of promoting democratic culture. The key point is that the United States has adopted a hybrid system: Instead of separating the functions of editor and distributor, and treating all distribution networks as common carriers like telephone companies, it has allowed a small number of editors/speakers to own powerful distribution networks not open to all in return for accepting various public service obligations and regulations. Thus the hybrid system is based on the model of a contract or a *quid pro quo*.

Although the hybrid system denies the vast majority of people free access to key distribution networks, it may nevertheless have been justified in the past by its economic advantages. Arguably it offers necessary incentives for broadcasters, cable companies, and owners of satellite systems to invest in, produce, and deliver a wide variety of diverse programming for viewers and listeners that will enrich public debate and public culture. Thus, it provides considerable grist for the mill of a democratic culture.

Nevertheless, a hybrid system is hardly perfect. Heavy reliance on advertising tends to create a significant mismatch between what broadcasters deliver and what viewers want, in part because advertisers seek content that appeals to the common tastes of certain valued demographic groups (whose preferences may otherwise be quite heterogeneous) rather than content that cross-cuts demographic groups or appeals to groups with comparatively little disposable income or comparatively unmanipulable consumption patterns. See BAKER, *supra* note 9, at 13, 24–26, 88–91, 182–90. Advertisers will also tend to push for content that helps induce greater consumption instead of content that appeals to and fulfills other values that viewers might have. For example, viewers may value many kinds of content that are not strongly tied to shopping, purchasing, and consumption. They may value content that educates them or inspires them to change their lives, rethink their values, or make use of their creative powers. Finally, market forces also will, almost by definition, underproduce content that has high positive externalities (like educational content, or balanced and informative coverage of news) because the value of that content to society cannot be captured by market forces, and, all other things being equal, the greater the positive externalities, the more underproduction there will be. *Id.* at 41–62, 114–18.

The hybrid model of media regulation is not constitutionally required. Rather, it is a *quid pro quo* or contractual arrangement, and it is constitutional to the extent that it promotes the values of a democratic culture. To be sure, regulatory *quid pro quos* can violate free speech rights if they impose an unconstitutional condition on free speech. However, structural regulations of the mass media that seek to counteract the limitations of mass media markets should be constitutional if there is a clear nexus between the goals of the regulation and the purposes behind the choice of a hybrid system. To the extent that structural regulations and public interest obligations of mass media compensate for the limitations of a hybrid model, they are tied to the very justifications for issuing broadcast licenses and cable franchises in the first place: They help further the goal of promoting a rich public sphere and a vibrant, participatory, and democratic culture. If government can make a sufficiently good case that the regulations will have this effect, the regulations should not be regarded as unconstitutional conditions on a media company's First Amendment rights. Likewise, public broadcasting that supplements existing markets with content that government reasonably believes to be valuable (like children's programming) should also be constitutionally permissible.

importance of that conception; I merely want to insist that it is only a partial conception, inadequate to deal with the features of speech that the new digital technologies bring to the foreground of our concern. The values behind freedom of speech are about production as much as reception, about creativity as much as deliberation, about the work of ordinary individuals as much as the mass media.

Freedom of speech is more than the freedom of elites and concentrated economic enterprises to funnel media products for passive reception by docile audiences. Freedom of speech is more than the choice of which media products to consume. Freedom of speech means giving everyone—not just a small number of people who own dominant modes of mass communication, but ordinary people, too—the chance to use technology to participate in their culture, to interact, to create, to build, to route around and glom on, to take from the old and produce the new, and to talk about whatever they want to talk about, whether it be politics, public issues, or popular culture.

VII

DIGITAL LIBERTY

Shifting our focus from democracy to democratic culture helps us better understand the idea of freedom of speech in the digital age. Indeed, I would go even further. Digital technologies change our understanding of what liberty of speech is. They make salient features of freedom of speech that have always been present. Digital technologies offer people the liberty to participate in culture through application of existing cultural materials, the ability to appropriate and innovate using tools freely available to all. Digital technology offers a possibility, not yet fully realized (and conceivably one that will never be fully realized), of what democratic culture might be.

A democratic culture is the culture of widespread “rip[ping], mix[ing], and burn[ing],”⁷⁵ of nonexclusive appropriation, innovation, and combination. It is the culture of routing around and glomming on, the culture of annotation, innovation, and bricolage. Democratic culture is not the same thing as mass culture. It makes use of the instrumentalities of mass culture, but transforms them, individualizes them, and sends what it produces back into the cultural stream. In democratic culture, individuals are not mere consumers and recipients of mass culture but active appropriators. Culture has always had opportunities for popular participation. The Internet and digital technologies merely increase the number of opportunities for widespread distribution, their scope, and their power; and, in the process, make

⁷⁵ See *supra* note 68.

them more obvious to us. Digital speech places these features of liberty—and the possibility of democratic culture—more clearly and centrally before us.

What is the liberty of expression, viewed from the perspective of the ideal of democratic culture? I would say that it has four important components that have been made more salient by digital technology: (1) the right to publish, distribute to, and reach an audience; (2) the right to interact with others and exchange ideas with them, which includes the right to influence and to be influenced, to transmit culture and absorb it; (3) the right to appropriate from cultural materials that lay at hand, to innovate, annotate, combine, and then share the results with others; and (4) the right to participate in and produce culture, and thus the right to have a say in the development of the cultural and communicative forces that shape the self.

What these facets of liberty have in common is that they are not self-regarding. Communication is interaction, sharing, influencing, and being influenced in turn. Creation is not creation *ex nihilo*, but building on the work of others; appropriation is not exclusive appropriation but making use of tools that lay to hand that are part of a common pool of resources. Distribution is not isolated but occurs through public pathways and networks that many can travel on. Finally, development of the self is a project that one shares with others.

In short, what the Internet makes salient to us is that freedom of expression, that most individualistic of liberties, that most personal of activities, is at the very same time deeply communal, because it is interactive, because it is participatory, because it builds on the work of what others have done, and because it makes use of public networks and pathways of distribution. I do not mean by this that liberty exists merely for the purposes of the state, or that individual liberty is an illusion. Far from it. I mean precisely the opposite—that the realization of individuality, the expression of one's individual self, the promotion of one's individual dignity, comes out of and through culture, a shared feature of life. Culture is the substrate, the raw materials of individual freedom, from which individual liberty emerges and within which individual liberty operates and innovates.⁷⁶

The concept of a democratic culture restores freedom to its central place in free speech theory, but in the process, offers a particular conception of what that freedom is:

Freedom is participation. Freedom is distribution. Freedom is interaction. Freedom is the ability to influence and be influenced in

⁷⁶ See BALKIN, *supra* note 63, at 17–19.

turn. Freedom is the ability to change others and to be changed as well. Freedom is the ability to glom on and route around. Freedom is appropriation, transformation, promulgation, subversion, the creation of the new out of the old. Freedom is mixing, fusing, separating, conflating, and uniting. Freedom is the discovery of synergies, the reshuffling of associations and connections, the combination of influences and materials.

Freedom is bricolage.

Dissent is central to this conception of free speech, for dissent is cultural as well as political.⁷⁷ Just as the progressivist/republican critique has too narrow a focus on why speech is valuable, it has too limited a conception of dissent. People may disagree with what the government is doing, and they may express themselves in politics, in music, or in art. But they can also disagree with the aesthetics and mores of others, and they can dissent by borrowing from and subverting what they borrow. And just as democratic culture undergirds democracy in the narrow sense without being identical to it, cultural dissent is an important source of political dissent without being subsumed by it.

Perhaps equally important, dissent involves all of the features of liberty I have just described: interaction, appropriation, and transformation. Dissent reacts to, borrows from, and builds on what it disagrees with. Dissent, whether in culture or in politics, is not mere negation. Rather, dissent is creative and cumulative. It appropriates elements of what it objects to and uses them in the process of critique, often through subverting or parodying them.⁷⁸ The nature and focus of dissent is shaped by what the dissenter disagrees with, and the form of response is shaped by the way the problem appears to the critic. Thus, dissent exists in an interactive and interdependent relationship to the object of its criticism, appropriating elements of what it rebukes in order to make its claims. Dissent makes use of the raw materials that inspire its disagreement and resistance. In this way, dissent, and responses to dissent, are not mere repudiations of what has come

⁷⁷ See Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 498 (2001) (noting ubiquitous disputes within cultural groups about values of group and terms of membership).

⁷⁸ See, e.g., JUDITH P. BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 141–49 (1990) (noting possibilities for subversion of existing sexual roles and creation of new ones through repetition and through performance); Amy M. Adler, *What's Left?*, 84 CAL. L. REV. 1499, 1529–31 (1996) (describing how pornography has been appropriated for feminist purposes); Judith P. Butler, *The Force of Fantasy: Feminism, Mapplethorpe, and Discursive Excess*, 2 DIFFERENCES 105, 119–20 (1990) (arguing that “discursive excess” offers opportunities for subversion and parody).

before, but have a cumulative effect, building on existing materials and practices, and propelling and transforming culture forward.

I have emphasized that the ability of ordinary individuals to produce their own culture is a central aspect of the liberty of free expression. What justifies this populist focus? Why shouldn't we organize telecommunications and intellectual property law to maximize the ability of large business enterprises to make large investments in cultural products (e.g., blockbuster movies) while allowing consumers to choose which ones they prefer to consume in the marketplace? Why isn't this cultural division of labor an equally good protection of freedom of speech?

One answer is that the ability to participate in culture and produce one's own meanings can offer people greater self-realization and self-fulfillment than perpetually being relegated to the docile consumption of mass media products. But even if we remain agnostic on that point, being an active producer/creator is at least as good a way of living as being a passive consumer/recipient, and it is an equally important part of the liberty of expression.

Market forces are likely to underprotect the right of ordinary individuals to be active cultural producers, because media companies are likely to make more money from consumption of the media products they advertise and sell. From the standpoint of these companies, individual cultural production has no independent value except to the extent that it involves or leads to the consumption of media goods. And to the extent that active cultural participation diverts end users from greater consumption of media products, interferes with the companies' expansive definition of intellectual property rights, or challenges corporate technologies of control, it is less valuable than passive consumption; indeed it is positively harmful and must be cabined in.

One might object that media companies will invest in products and services that facilitate individual cultural appropriation and production if consumers want them badly enough. To some extent this is true: We have already seen the beginnings of this in multi-user online games. But individual cultural production often has high positive externalities; it provides benefits and satisfactions that are not easily captured by markets.⁷⁹ So media companies may have insufficient incentives to facilitate individual cultural appropriation and production. Conversely, they will tend to over-invest in products that relegate individuals to a position of relatively passive consumers.

⁷⁹ See BAKER, *supra* note 9, at 41–55.

Choosing what products to consume is a kind of liberty, but it does not exhaust the liberty of free expression. The ability to produce, create, and innovate is just as important. These two forms of liberty are not fungible, and markets do not adequately measure the difference between them.⁸⁰ To protect freedom of expression, then, we must make a space for individual cultural appropriation and production. We should not choose a form of political economy that gives greater incentives to be a passive recipient than an active creator of culture.

Democratic culture is a regulative ideal. It offers a picture of what the world could look like given the technology we now have. It offers a picture of what freedom of speech could be in a digital world. Nevertheless, digital technology does not guarantee the production of a democratic culture. As I noted previously, businesses are now using the new technologies to attempt to constrain and channel democratic participation. They are doing so both through laws and through technological solutions, including packet discrimination and digital rights management. And they are justifying these innovations through an interpretation of freedom of speech that ties speech to property rights. This capitalist conception is important both for its explanation of what freedom of speech is (freedom from business regulation) and what it is not (an enforceable limit on the expansion of intellectual property rights).

The ideal of democratic culture is important precisely as a critical perspective that allows us to criticize this emerging interpretation of free speech and intellectual property. The developing capitalist conception of freedom of speech (and its accompanying denial of free speech limitations on the growth of intellectual property) is inconsistent with the promotion of a democratic culture. The same technological changes that suggested what a democratic culture might become have produced a very different interpretation of the free speech principle that ties it ever more closely to the ownership of the forms of capital characteristic of the information age—intellectual property and control over distribution networks. The idea of a democratic culture stands as a critique of this emerging property-based conception. That critique is crucial, because the architecture of the digital age and the law that governs distribution networks are up for grabs. They can develop in many different ways, and the point is to ensure that they develop in the right ways.

⁸⁰ Purchasing media products is a kind of liberty, because it involves choice. It is also a kind of creativity, because an agreement between a willing buyer and a willing seller creates wealth. But it does not exhaust the forms of choice and creativity with which freedom of speech is concerned.

VIII

THE JUDICIAL MODEL AND ITS LIMITATIONS

To protect freedom of speech in the digital age, we will have to reinterpret and refashion both telecommunications policy and intellectual property law to serve the values of freedom of speech, which is to say, we will have to fashion and interpret them with the goals of a democratic culture in mind.

How is this to be done? I have argued that the digital age subtly alters our understanding of liberty of expression. I believe it also changes how that liberty might be protected.

Throughout the twentieth century, the most familiar method of protecting freedom of speech was through the judicial creation and protection of individual legal rights, and in particular, constitutional rights. Of course, when we look more closely, we will also discover many other features of public policy that promoted free speech values. They include, among other things, free public education, the creation and maintenance of public libraries, a nationwide public mail system, subsidies for postage for books and publications by nonprofit organizations, the use of common carrier models for telephony, and national telecommunications policies that attempted to lower costs and increase access to radio and television. For the most part, however, these policies have been regarded as largely peripheral to the main event—the judicial recognition and creation of doctrines that protect free speech rights from government censorship or other forms of government regulation.

Indeed, the very success of the program of expanding individual free speech rights protected by courts made it an article of faith that this was how freedom of speech should be secured—through the judicial creation and protection of individual rights of free expression enforceable against state actors. This notion has two important and distinct assumptions. First, it assumes that one protects freedom of expression through protecting individual rights of free speech, rather than through creating systems of communication and information-sharing used by lots of people that facilitate free expression. Put differently, it views the system of free expression as no more than the sum of all of the individual rights of free expression. Second, the model assumes that these individual rights will be created and protected primarily by courts, rather than by legislatures or administrative agencies, or, for that matter, by engineers, software designers, and technology companies.

Nevertheless, the examples I mentioned earlier—free public education, free public libraries, common carrier rules in telephony, public

interest rules in telecommunications, a public mail system, government subsidies for books and nonprofit publications, and so on—do not match these assumptions. They are policies and institutions that promote a healthy and democratic system of free expression, but they are not composed of individual free speech rights. Rather, they combine lots of different private rights with various government programs and entitlements, and in the case of telecommunications regulations, they may even include requirements for technological design. Second, these features of the system of free expression are not always primarily created or protected by courts. Rather, they are created by a number of parties, including legislatures and administrative agencies.

The model of judicial protection of individual rights remains crucially important in the digital age. But it will not be able to protect freedom of speech fully. The digital age makes increasingly apparent what has always been the case—that the system of free expression relies on something more than the sum of all individual free speech rights. It relies on a technological and regulatory infrastructure. That infrastructure is produced through government regulation, through government subsidies and entitlement programs, and through technological design. Freedom of speech is, and always has been, a cultural phenomenon as well as a legal or political one. A healthy and well-functioning system of free expression depends on technologies of communication and a public ready and able to use those technologies to participate in the growth and development of culture.

In the digital age, the technological and regulatory infrastructure that undergirds the system of free expression has become increasingly important. Elements of the system of free expression that were backgrounded in the twentieth century will become foregrounded in the twenty-first. They will be foregrounded, I argue, because the guarantee of a pure formal liberty to speak will increasingly be less valuable if technologies of communication and information storage are biased against widespread individual participation and toward the protection of property rights of media corporations. If we place too much emphasis on judicial doctrine at the expense of infrastructure, we will be left with formal guarantees of speech embedded in technologies of control that frustrate their practical exercise.

The system of free expression is produced through the synergy of (1) government policies that promote popular participation in technologies of communication, (2) technological designs that facilitate decentralized control and popular participation rather than hinder them, and (3) the traditional recognition and enforcement of judicially created rights against government censorship. The last of these—judicial creation and enforcement of rights of free speech against govern-

ment abridgement—is the great achievement of the twentieth century. Nevertheless, I believe that in the long run it will be recognized as only one leg of a three-legged stool that supports the system of free expression. The other elements will increasingly move to the foreground of concern as it becomes clear that they are necessary to the promotion of a democratic culture.

IX

THE INFRASTRUCTURE OF FREE EXPRESSION: FROM FREE SPEECH RIGHTS TO FREE SPEECH VALUES

As the focus shifts from an exclusive concern with judicially protected individual constitutional rights to an additional concern with infrastructure, we must also shift our concern from free speech *rights* narrowly considered to free speech *values*. Free speech rights are rights of individuals enforceable by courts. Free speech values are values that we seek to promote through legislative and administrative regulation and through technological design.

Protecting freedom of speech in the digital age means promoting a core set of values in legislation, administrative regulation, and the design of technology. What are those values? They are interactivity, broad popular participation, equality of access to information and communications technology, promotion of democratic control in technological design, and the practical ability of ordinary people to route around, glom on, and transform. Free speech values include those aspects of liberty of expression that the digital age makes most salient: popular participation, interactivity, and the encouragement and protection of cultural creativity and cultural transformation.

Both technological architectures and legal regimes of regulation must be structured to make possible full and robust participation by individuals. Free speech values must enter both into the content of laws and the design of architectures of communication. That is because the key forms of capital in the digital era—intellectual property and telecommunications networks—can serve both as conduits for increased democratic cultural participation or as chokepoints and bottlenecks, centralizing control in the hands of a relatively few persons and organizations. What form informational capital will take, how it will be used, how it will be shared or if it will be shared at all, are the crucial questions of the digital age.

At stake in both intellectual property and telecommunications regulation is the question of democratic participation versus centralized control. This is most obvious in the context of distribution networks: The capitalist theory of free speech asserts the right of the

owner of a communications network to control the flow of digital content through the network. But the capitalist theory also seeks to expand intellectual property rights so that rights holders can control the distribution, use, and transformation of media products even after these products are distributed and sold to a mass audience. The theory of free speech as democratic culture, by contrast, argues that both communications networks and intellectual property rights must facilitate broad cultural participation. Communications networks are public in nature even if their technological infrastructure is privately owned. Therefore they must grant fair access to their networks, they must not act as chokepoints or bottlenecks, and they must not unfairly discriminate against content from other sources. Intellectual property rights must also serve democratic ends: They exist to promote the spread of culture and possibilities for cultural innovation and transformation.

To make intellectual property consistent with the idea of free speech as democratic culture, there must be a robust and ever expanding public domain with generous fair use rights. Intellectual property also must not be permitted to create chokepoints or bottlenecks in the spread of knowledge and the distribution of culture.

Judicial creation and protection of individual rights is ill equipped to deal with many of the most important problems of freedom of speech in the digital era. Free speech values are often either promoted or hindered by the ways that technologies are designed and the ways that technological standards are set. Technological designs and standards can let private parties become gatekeepers and bottlenecks controlling the flow of information and the scope of permissible innovation; or, conversely, they can promote widespread participation and innovation.

Law has an important role to play here. Laws affect how technology is designed, the degree of legal protection that a certain technology will enjoy, and whether still other technologies that modify or route around existing technological forms of distribution and control will be limited or forbidden. But increasingly, these sorts of decisions will be made by legislatures and administrative agencies in consultation with private parties. Generally speaking, courts come to free speech controversies after technologies are already in place and deals between stakeholders have already been struck. Courts can construe existing statutes to protect free speech values. But in most cases they cannot easily order that particular new technologies or new standards be implemented. They cannot easily hold, for example, that a certain technological design must be adopted. They cannot insist that private companies refrain from using certain digital rights management tech-

nologies in return for a congressional statute that sets up a compulsory licensing scheme. Courts can remand lower court and administrative agency decisions, but they cannot easily remand technologies to their designers and ask them to make the technology more free speech friendly. Nor can they order or oversee the sort of comprehensive bargains that contemporary intellectual property regulation increasingly requires. Those tasks will fall to other actors, with courts enforcing the legal bargains that are produced consistent with free speech values.

The free speech values I have identified—participation, access, interactivity, democratic control, and the ability to route around and glom on—won't necessarily be protected and enforced through judicial creation of constitutional rights. Rather, they will be protected and enforced through the design of technological systems—code—and through legislative and administrative schemes of regulation, for example, through open access requirements or the development of compulsory license schemes in copyright law.

This transforms the study of freedom of speech to the study of the design of architectures and regulatory systems. It is no accident, I think, that many of the people who are at the forefront of the push for freedom in cyberspace are computer scientists, engineers, and software programmers, and it is no accident that lawyers who do cyberlaw spend an increasing amount of time thinking about technological and administrative solutions to civil rights issues. That is because, as I have argued, free speech values are embedded both in administrative regulations and in technological design. To protect free speech in the digital age, lawyers have to become cyberlawyers,⁸¹ not simply lawyers who study cyberlaw, but lawyers who think about how technology can best be structured and how public policies can best be achieved through wise technological design.⁸²

CONCLUSION: RIGHTS DYNAMISM

I return to the question I posed at the beginning of this essay: How should the theoretical justifications for freedom of speech change given the change in social conditions produced by the digital age?

We can now offer an answer to this question. Technological change presents new possibilities for freedom of expression, shows the value of free speech in a different light, and makes particular features

⁸¹ See Beth Simone Noveck, *Designing Deliberative Democracy in Cyberspace: The Role of the Cyber-Lawyer*, 9 B.U. J. SCI. & TECH. L. 1, 5, 8–10 (2003).

⁸² See, e.g., LESSIG, CODE AND OTHER LAWS OF CYBERSPACE, *supra* note 17, at 3–8.

of freedom of speech particularly salient. These features include interactivity, mass participation, nonexclusive appropriation, and creative transformation. This in turn leads us to a new conception of the purposes of freedom of speech, which I have called the promotion of a democratic culture.

However, these same technological changes also create new forms of social conflict, as business interests try to protect new forms of capital investment. This leads, in turn, to attempts to protect and expand rights in intellectual property and in the control of telecommunications networks. These rights claims clash with freedom of speech values in ever new ways; and the attempt to protect property rights in capital investment leads to competing visions of what freedom of speech is and what it is not.

Finally, as technological innovation alters the social conditions of speech, the technological and legal infrastructure that supports the system of free expression becomes foregrounded. As a result, free speech values must be articulated and protected in new ways, in particular, through the design of technology and through legislative and administrative regulation of technology, in addition to the traditional focus on judicial doctrines that protect constitutional rights.

As the world changes around us, as the possibilities and problems of new technologies are revealed, our conception of the free speech principle begins to change with them. Our sense of what freedom of speech is, why we value it, and how best to preserve that which we value, reframes itself in the changing milieu. And as we respond to these changes, retracing our steps and rethinking our goals, we eventually come to understand what the free speech principle is about, and more importantly, what it always was about but only now can be adequately expressed. That experience is not the experience of making something new. It is the experience of finding something old, of recognizing principles and commitments already dimly understood, which suddenly are thrown into sharper focus by the alteration in our circumstances.

The arguments in this essay are an outgrowth of a more general way of thinking about rights and fundamental liberties. Call it a dynamic theory of rights, or *rights dynamism*. Rights dynamism is the claim that the nature, scope, and boundaries of rights, and in particular fundamental rights like speech, are continually shifting with historical, political, economic, and technological changes in the world.⁸³

⁸³ For a more general account of legal historicism, of which dynamism is a special case, see Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 GEO. L.J. 173, 174-75 (2001) (defining legal historicism as claim that legal conventions and forms of legal argument

The content and scope of those rights, the interests they protect and the interests they leave unprotected, change as the language of rights and the enforcement of rights are placed in new contexts, and are invoked by different actors and different economic and social interests. Hence it is necessary for those who believe in the language of rights—and in the recognition and protection of basic and fundamental rights such as the liberty of expression—to rethink the premises of rights as the discourse of rights is invoked in emerging social contexts. For only through constant rethinking, in the face of changed circumstances, can we recall and rediscover what our deepest commitments truly are. What appears to be change is actually continuity; what appears to be revision is actually the deepest form of remembrance.

Most people, I suspect, will be wary of such historicism for an obvious reason. If rights are truly fundamental, and therefore worth protecting and fighting for, their content should be relatively fixed over time. We should not alter what is protected and what is not protected every time we come across a result we do not like, for if the content and scope of basic liberties can change, and if they must be retheorized and reconceptualized in each generation, who is to say that they will not be eroded, undermined, or effectively destroyed? Even if we only set out to change our attitudes about these basic rights at the margins, jettisoning some elements and adding others, who is to say that we will not throw out the baby with the bathwater? What security do we have in rights that can change as history changes?

I do not underestimate these worries, or the force of these concerns. They describe a great danger for liberty. They articulate the threat that all historicism (and all relativism) present to principle and to principled argument. But here is the catch. If we do not, from time to time, rethink the scope and extension of our basic liberties, their scope and extension will change anyway, whether we like it or not. For faced as we are with social, technological, and economic change, other people will be busily rewriting rights and turning them to their own advantage. And if we do nothing to contest their work in an

gradually change in response to political and social struggles that are waged through them). See also PAUL BREST, SANFORD LEVINSON, J.M. BALKIN & AKHIL REED AMAR, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING*, at xxxi–xxxii (4th ed. 2000) (articulating theory of constitutional historicism). I am using the term “dynamism” rather than historicism in order to emphasize two separate points: First, rights dynamism is internal to participants in the practice of rights discourse rather than a stance that merely studies the discourse from the outside with no particular stake in its outcome. Second, rights dynamism is forward-looking, concerned with the future of a practice whose full contours cannot be known in advance, rather than a backward-looking historicism that attempts to articulate and comprehend changes that occurred in the distant past.

altered environment, we will soon find ourselves living with a set of fundamental rights framed and shaped according to their interests and their agendas.

Rights are a form of discourse, a way of thinking about the needs of social order and human liberty in the context of a changing world. Rights are also a source of power—first, because they are a powerful form of rhetorical appeal, and second, because the enforcement of rights recognized by the state is backed up the power of the state. Because of this, rights and rights discourse are continually invoked by people and by groups to further their ideals, interests, and agendas: For the discourse of rights is the discourse of power, the restructuring of rights is the restructuring of power, and the securing of rights is the securing of power.

As people face new problems and altered circumstances, they naturally invoke elements of existing rights discourses, hoping to extend them in preferred directions in order to articulate their moral and political ends and further their favored policies. They call upon the struggles and victories of the past and the legal concepts of the present in order to shape the future. This is as true of groups and interests we like as those we oppose.

Rights are not simply a fixed set of protections that the state affords or fails to afford. Rights are a terrain of struggle in a world of continuous change—a site of ongoing controversies, a battleground where the shape and contours of the terrain are remade with each victory. Rights, and particularly fundamental rights, far from being fixed and immovable, are moving targets. They are worth fighting over because the discourse of rights has power and because that discourse can be reshaped and is reshaped through intellectual debate and political struggle.

This feature of rights discourse is a special case of what I have called “ideological drift.” The liberty of expression has no special security from such drift. To the contrary, it is subject to the pushing and pulling, the reconceptualizations and transvaluations to which all other rights are heir. The capitalist theory of rights that I have described previously is only the most recent example.

If one loves liberty, and believes that there are basic liberties that every decent society should recognize and protect, one must also recognize that the rhetorical reconstruction of rights will be ongoing whether we or others perform it. What we do not do for ourselves will surely be done to us.

Eternal vigilance, it is often said, is the price of liberty. But that vigilance is of two forms. The first kind of vigilance is the vigilance of the guardian, who attempts to ensure that every feature and aspect of

liberty is preserved today just as it was in ages past. But the second and far more important form of vigilance is the vigilance of the guide or explorer, who helps others make the transition from the world they knew to the one that awaits them.

People are continually thrown into new circumstances and they must articulate the meaning of liberty in those new circumstances. The task of such a guide or explorer is to find the meaning of the old in the new, and to prevent the rhetoric of liberty from becoming liberty's prison. Such vigilance is every bit as important as the vigilance of the guardian. And this vigilance, too, is eternal, and its exercise, too, is the ineluctable price of liberty. The world will not stand still and let us enjoy our freedoms. It will continually make itself anew, and as it does, we must consider the ever-changing predicament of liberty, and the ever new methods by which it may be augmented or curtailed.

The digital revolution is a revolution, and like all revolutions, it is a time of confusion, a time of transition, and a time of opportunity for reshaping the structures of the economy and the sources of power. As a time of opportunity it is also a time of opportunism, a period in which the meaning of liberty of expression will be determined for good or for ill, just as the meaning of economic liberty was determined in an earlier age. Make no mistake: The digital age will change the meaning of freedom of expression. The only question is how it will change. If we do not reconsider the basis of liberty in this age, if we do not possess the vigilance of the guide as well as the guard, we shall end up like every person who travels through the wilderness without a compass, or through the forest without the forester. We shall end up lost.

Editors' note: Corrigendum released September 18, 2009. Original judgment has been corrected, with text of corrigendum appended.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Crookes v. Newton*,
2009 BCCA 392

Date: 20090915
Docket: CA036623

Between:

Wayne Crookes and West Coast Title Search Ltd.

Appellants
(Plaintiffs)

And

Jon Newton

Respondent
(Defendant)

Corrected Judgment: The text of the judgment was corrected at paragraph 84
where changes were made on September 18, 2009

Before: The Honourable Madam Justice Prowse
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Bauman

On Appeal from the Supreme Court of British Columbia, Vancouver Registry,
Docket No S072729, 2008 BCSC 1424, October 27, 2008

Counsel for the Appellants: R.A. Kasting

Counsel for the Respondent: D.W. Burnett

Place and Date of Hearing: Vancouver, British Columbia
May 25, 2009

Place and Date of Judgment: Vancouver, British Columbia
September 15, 2009

Dissenting Reasons by:

The Honourable Madam Justice Prowse

Written Reasons by:

The Honourable Madam Justice Saunders (Page 28, para. 78.)

Concurred in by:

The Honourable Mr. Justice Bauman

Dissenting Reasons for Judgment of the Honourable Madam Justice Prowse:**INTRODUCTION**

[1] Mr. Crookes and West Coast Title Search Ltd. (together, “Mr. Crookes”) are appealing from the order of a trial judge, made October 27, 2008, dismissing their action against Mr. Newton for damages for defamation. The order was made pursuant to cross-applications by Mr. Crookes and Mr. Newton pursuant to Rule 18A of the *Rules of Court*.

[2] The trial judge dismissed Mr. Crookes’ action on the basis that Mr. Crookes had failed to prove publication of the alleged defamatory material. If Mr. Crookes is successful on appeal, it will be necessary to remit other issues raised in the pleadings to the trial court for determination.

[3] Mr. Crookes has also sued several other defendants for defamation relating to the same materials at issue in this appeal. He has obtained default judgment against one defendant; his action against two others has been dismissed; and the trial of his action against two further defendants has been adjourned generally.

[4] In brief, Mr. Crookes alleges that he has been defamed in various articles which first appeared on the Internet in 2005. Three of the articles, entitled “Wayne Crookes”, “Friends of Crookes” and “Gang of Crookes” appeared on the website, www.openpolitics.ca (“openpolitics”). A fourth article, entitled “Wayne Crookes”, appeared on the website, www.usgovernetics.com (“usgovernetics”).

[5] Mr. Newton owns and operates the website, www.p2pnet (“p2pnet”). On July 18, 2006, he authored an article, headed “Free Speech in Canada” which hyperlinked the Wayne Crookes article found on the usgovernetics website, and the openpolitics website containing the other impugned articles. Those articles, in turn, were hyperlinked to one another. Mr. Crookes takes the position that, by creating these hyperlinks, or, by refusing to remove the hyperlinks when advised of their

defamatory character, Mr. Newton became a publisher of the impugned articles found at the hyperlinked websites.

ISSUES ON APPEAL

[6] The overriding issue on appeal is whether the trial judge erred in finding that Mr. Crookes had failed to prove publication of the impugned hyperlinked articles.

This issue can be broken down into two sub-issues, namely:

- (1) whether the trial judge erred in finding that the creation of a hyperlink in a website does not lead to a presumption of publication of the materials found at the hyperlinked site;

and

- (2) whether the trial judge erred in finding that hyperlinking in these circumstances did not amount to publication by Mr. Newton of the articles found at the hyperlinked sites, taking into account all of the evidence.

[7] There was no issue raised on appeal as to whether the impugned articles were, in fact, defamatory. For the purpose of this appeal, I will assume, without deciding, that the articles were defamatory of Mr. Crookes. This appears to have been the approach adopted by the trial judge.

BACKGROUND

[8] Mr. Crookes is a Vancouver businessman and the President and sole shareholder of West Coast Title Search Ltd. He is described in his factum as being a “sometime volunteer” for the Green Party of Canada. It is his connection with the Green Party which is the subject of the various articles he claims to be defamatory.

[9] Mr. Newton describes himself as a journalist. His p2pnet website provides unrestricted access via the Internet. The website contains commentary on various issues, including issues involving free speech and the Internet. After becoming aware of a defamation action Mr. Crookes’ had commenced in May 2006 against a Mr. Pilling (who is alleged to be the original author of the offending articles found on openpolitics), Mr. Newton used his p2pnet site to distribute his article, “Free Speech in Canada”. That article referred to Mr. Crookes’ action against Mr. Pilling and the

implications of such actions in terms of free speech for those who operate Internet forums. As earlier stated, he created a hyperlink in his article to the Wayne Crookes article on the usgovernetics website and another hyperlink to the openpolitics website where the other impugned articles are found. Mr. Newton, who did not know Mr. Crookes, did not reproduce in his own article any of the content of the offending articles, or comment in any way on their content.

[10] Mr. Newton's article came to Mr. Crookes' attention on July 18, 2006. On August 18, 2006, Mr. Crookes sent an email to Mr. Newton at the email address provided by Mr. Newton on his p2pnet website requesting Mr. Newton to remove the hyperlinks to both the usgovernetics and openpolitics websites. He received no response to this request. On October 31, 2006, Mr. Crookes' lawyer wrote to Mr. Newton asking Mr. Newton to remove the hyperlinks on the basis that the sites contained material defamatory of Mr. Crookes. Mr. Newton refused to do so. He subsequently deposed that his refusal was based on his view that there was no need to remove them because they were "merely a hyperlink".

[11] As of February 1, 2008, the article "Free Speech in Canada" had been "viewed" a total of 1,788 times. There was no evidence as to how many times, if any, the hyperlinks in the article had been viewed, and no evidence as to whether it was possible to obtain such information, and, if so, at what cost.

[12] The summary trial was heard on August 29, 2008. At the hearing, it was common ground that the trial judge could decide the issue of whether Mr. Newton was a publisher of the impugned articles on the basis of the materials filed.

DECISION OF THE TRIAL JUDGE

[13] The trial judge referred to the issues before him at paras. 10-11 of his reasons for judgment, as follows:

[10] There are two issues for determination in this application. First, the defendant says that there is no evidence that any person followed the hyperlinks in question or read the words that are complained of. The plaintiffs

have therefore failed to prove publication, one of the essential elements of the tort of defamation.

[11] Second, in any event, the defendant argues that creating a hyperlink to words that are defamatory is not publication of those words.

[14] The trial judge noted that the defendants took the position that the defences of fair comment and qualified privilege were not suitable for summary disposition.

[15] After asking the question (at para. 13), “Are the plaintiffs required to lead evidence that persons actually followed the hyperlinks and read the words that are complained of?”, the trial judge observed that Mr. Crookes’ position was that publication of the hyperlinked material should be presumed by analogy with statements contained in newspapers, and those broadcast to the general public, which are deemed to be published under ss. 2 and 12(2) of the *Libel and Slander Act*, R.S.B.C. 1996, c. 263. The trial judge rejected this submission.

[16] After referring to several authorities, and noting Mr. Crookes’ argument that the fact that Mr. Newton’s website permitted unrestricted access operated as a factor favouring a presumption of publication, the trial judge focused on the fact that Mr. Crookes had not led evidence that a third party had actually accessed the hyperlink to the impugned articles. At para. 20 of his reasons for judgment, the trial judge stated:

[20] Regardless [of the unrestricted access to Mr. Newton’s internet site], the issue in this case is not how accessible the website is, but rather, if anyone followed the hyperlinks posted on the p2pnet site. Without proof that persons other than the plaintiff visited the defendant’s website, clicked on the hyperlinks, and read the articles complained of, there cannot be a finding of publication. As in *Crookes v. Holloway* [2007] BCSC 1325, 75 B.C.L.R. (4th) 316, aff’d 2008 BCCA 165, 77 B.C.L.R. (4th) 201], the plaintiffs have not adduced any evidence to support this claim.

[17] The trial judge expressly rejected the argument that there was a presumption of publication to a third party at para. 24 of his reasons for judgment:

[24] In my view, the mere creation of a hyperlink in a website does not lead to a presumption that persons read the contents of the website and used the hyperlink to access the defamatory words.

[18] The trial judge then went on to consider whether, absent a presumption of publication, Mr. Newton's use of hyperlinks to the defamatory material constituted publication of the defamatory material by him. In that respect, the trial judge placed considerable reliance on the decision of this Court in *Carter v. B.C. Federation of Foster Parents Assn.*, 2005 BCCA 398, 42 B.C.L.R. (4th) 1, where this Court held that the reference to a website in a printed newsletter, where there was no element of control by the defendant over that website, did not amount to publication of defamatory material found at that site. Although this Court specifically declined to express any view as to whether a reference in an internet website to another site could give rise to publication of the defamatory material found at the second site, the trial judge in this case adopted the reasoning in *Carter* to find that hyperlinking in this case did not amount to publication by Mr. Newton of the hyperlinked articles. He drew an analogy between footnotes in an article and the hyperlinks in this case and expressed the view (at para. 28) that a footnote which refers to another source "does not make the author who provided the footnote a publisher of what the reader finds when the footnote is followed".

[19] Key passages from the trial judge's reasons with respect to the issue of whether hyperlinking in this case amounted to the publication of the defamatory articles by Mr. Newton are paras. 29-31, as follows:

[29] A hyperlink is like a footnote or a reference to a website in printed material such as a newsletter [as in *Carter*]. The purpose of a hyperlink is to direct the reader to additional material from a different source. The only difference is the ease with which a hyperlink allows the reader, with a simple click of the mouse, to instantly access the additional material.

[30] Although a hyperlink provides immediate access to material published on another website, this does not amount to republication of the content on the originating site. This is especially so as a reader may or may not follow the hyperlinks provided.

[31] I conclude that the reasoning of the Court of Appeal in *Carter* leads to the same conclusion on the narrower issue before me. Readers of a newsletter, whether in paper form or online, who read of a reference to a third party website, may go to that website. I conclude that that does not make the publisher of the web address a publisher of what readers find when they get there.

[20] The trial judge emphasized that Mr. Newton did not publish any defamatory material in his own article on the p2pnet website; he did not reproduce any of the content from the impugned articles; and he did not comment on them. The trial judge adopted the proposition found in *MacFadden v. Anthony*, 117 N.Y.S. 2d 520 (Sup. Ct. 1952), and *Klein v. Biben*, 296 N.Y. 638, 69 N.E. 2d 682 (Ct. App. 1946), that “reference to an article containing defamatory content without repetition of the comment itself should not be found to be a republication of such defamatory content”.

[21] The trial judge also made it clear, however, that it was not his view that hyperlinking could never make a person liable for the contents of the hyperlinked site. At para. 34, he stated:

[24] ... For example, if Mr. Newton had written “the truth about Wayne Crookes is found here, and “here” is hyperlinked to the specific defamatory words, this might lead to a different conclusion.

[22] The trial judge did not address the fact that Mr. Newton refused to remove the hyperlinks when requested to do so by Mr. Crookes.

DISCUSSION

1. General Principles

[23] This appears to be the first case at the appellate level in Canada which addresses the question of if and when an author of an article who provides a hyperlink in his or her article to another website or article which contains defamatory material can be found liable for defamatory comments contained in the linked articles. The implications of this issue are significant. I find it useful, therefore, to refer to some “first principles” which should be kept in mind in undertaking this analysis.

[24] It is trite law that defamation cannot be found without publication. Publication is defined in the following extract from *The Law of Defamation in Canada* (Raymond Brown, 2d ed. Looseleaf (Scarborough, Ont: Carswell, 1994)), vol. 1, at 7-4, 7-5:

Publication is a term of art meaning the communication of defamatory matter to a third person.” It is a bilateral act by which the publisher makes available to a reader, listener or observer in a comprehensible form the defamatory information. Therefore, the defamatory remarks, about which the plaintiff complains, must be shown to have been published to a third person, that is, they must have been communicated to some person other than the one defamed, even if that involves only a single individual ... [Footnotes omitted.]

[25] The Internet has fostered an exponentially expanded opportunity for individuals to communicate about every conceivable matter to the world at large. It has, thus, created an exponentially expanded potential for the spread of defamatory material. This fact has presented challenges to courts seeking to find the balance between the competing values of freedom of speech and protection of reputation which arise in defamation cases. One expression of the nature of those competing interests in the Internet context is found in an article, Lyrissa Barnett Lidsky, “Silencing John Doe: defamation & discourse in cyberspace” (2000), 14:4 Duke L.J. 855, where the author, in commenting on the potential effects of “libel chill” on freedom of speech, states at 860-61, 863-64:

The promise of the Internet is empowerment: it empowers ordinary individuals with limited financial resources to “publish” their views on matters of public concern. The Internet is therefore a powerful tool for equalizing imbalances of power by giving voice to the disenfranchised and by allowing more democratic participation in public discourse. In other words, the Internet allows ordinary John Does to participate as never before in public discourse, and hence, to shape public policy.

...

Although Internet communications may have the ephemeral qualities of gossip with regard to accuracy, they are communicated through a medium more pervasive than print, and for this reason they have tremendous power to harm reputation. Once a message enters cyberspace, millions of people worldwide can gain access to it. Even if the message is posted in a discussion forum frequented by only a handful of people, any one of them can republish the message by printing it or, as is more likely, by forwarding it instantly to a different discussion forum. And if the message is sufficiently provocative, it may be republished again and again. The extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that “the truth rarely catches up with a lie.” The problem for libel law, then, is how to protect reputation without squelching the potential of the Internet as a medium of public discourse. [Footnotes omitted.]

[26] In Australia, the High Court referred to the ubiquity of the Internet and the special challenges it presents to the law of defamation in *Dow Jones and Company Inc. v. Gutnick*, [2002] HCA 56, 210 CLR 575. There, in dealing with a jurisdictional issue concerning the downloading in Victoria of defamatory material contained in the *Wall Street Journal* and *Barron's Online*, Gaudron J. (in reasons concurring with the majority) reviewed in some detail the challenges presented by the Internet and the World Wide Web in the context of defamation. In his reasons for judgment, Gaudron J. rejected the notion that effective remedies for Internet defamation were not possible. At paras. 115-116 of the decision, he stated:

[115] Any suggestion that there can be no effective remedy for the tort of defamation (or other civil wrongs) committed by the use of the Internet (or that wrongs must simply be tolerated as the price to be paid for the advantages of the medium) is self-evidently unacceptable. Instruments of international human rights law recognise the right of "[e]veryone ... to hold opinions without interference" and to enjoy "the right to freedom of expression ... [including] freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers... through any... media of his choice". [*International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 ("ICCPR")]

[116] The [ICCPR] also provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation". And that "[e]veryone has the right to the protection of the law against such interference or attack". Accordingly, any development of the common law of Australia, consistent with such principles, should provide effective legal protection for the honour, reputation and personal privacy of individuals. To the extent that our law does not do so, Australia, like other nations so obliged, is rendered accountable to the relevant treaty body for such default.

Canada became a signatory of the ICCPR on May 19, 1976.

[27] In *Carter*, this Court noted that the relative weight to be given to the concepts of freedom of expression and protection of individual reputation in the defamation context is one which is value laden and policy-directed. In preferring English and Australian authorities over the "single publication rule" adopted in the United States Mr. Justice Hall, speaking for the Court in *Carter* stated, at para. 20:

[20] Ultimately, the question of whether the Commonwealth or American approach is preferable has a considerable element of policy inherent in it.

Recently, in *Gilles E. Neron Communication Marketing Inc. v. Chambre des notaries du Quebec*, [2004] 3 S.C.R. 95, 2004 SCC 53, a defamation case brought against the CBC by a communications consultant employed by the Chambre des notaries, LeBel J. for the majority remarked on the balancing the courts must undertake in defamation actions (at paras. 52 and 54):

Despite its undoubted importance, freedom of expression is not absolute. As this Court noted in *Prud'homme* [*v. Prud'homme*], [2002] 4 S.C.R. 663, 2002 SCC 85], at para. 43, freedom of expression can be limited by the requirements imposed by other people's right to the protection of their reputation. Cory J. observed in *Hill* [*v. Scientology*], [1995] 2 S.C.R. 1130], at para. 108, that reputation, as an aspect of personality, is equally worthy of protection in a democratic society concerned about respect for the individual:

Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.

...

In an action for defamation the two fundamental values of freedom of expression and the right to respect for one's reputation must be weighted against each other to find the necessary equilibrium ... [Emphasis of LeBel J.]

[28] I do not understand the more recent decision of the Supreme Court of Canada in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420 to have resiled from these statements of principle. On the contrary, at para. 2 of the decision, Mr. Justice Binnie, speaking for the court, stated:

[2] This is a private law case that is not governed directly by the *Charter*. Yet it was common ground in the argument before us that the evolution of the common law is to be informed and guided by *Charter* values. Particular emphasis was placed on the importance of ensuring that the law of fair comment is developed in a manner consistent with the values underlying freedom of expression. However, the worth and dignity of each individual,

including reputation, is an important value underlying the *Charter* and is to be weighed in the balance with freedom of expression, including freedom of the media. The Court's task is not to prefer one over the other by ordering a "hierarchy" of rights (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835), but to attempt a reconciliation. An individual's reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to "chill" freewheeling debate on matters of public interest. ... [Emphasis added.]

[29] It is with these basic principles in mind, and acknowledging the challenges presented by Internet communications in the context of the law of defamation, that I turn to the specific issues concerning publication on the Internet raised in this appeal.

2. Standard of Review

[30] The question of publication is a question of fact to be determined in the circumstances of each case. The standard of review for findings of fact is one of palpable and overriding error. Here, however, Mr. Crookes has alleged that the trial judge made errors in law in failing to find publication. The standard of review with respect to errors of law is one of correctness. (See *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8.)

3. Publication to a Third Party

(a) Presumption of Publication

[31] The principal argument of Mr. Crookes at trial was that the trial judge should apply a presumption of publication of the hyperlinked articles, by analogy with statements made in newspapers or broadcast to the general public.

[32] As observed by the trial judge, however, the presumption of publication in relation to newspapers and broadcasts is expressly provided for in ss. 2 and 12(2) of the *Libel and Slander Act*, which provide:

2 Defamatory words in a broadcast are deemed to be published and to constitute libel.

...

12(2) The production of a printed copy of a newspaper is proof, in the absence of evidence to the contrary, of the publication of the printed copy.

[33] There is no such statutory provision providing for presumed publication of communications distributed through the Internet. Nor was the judge persuaded that he should extend the presumption of publication to Internet communications, and, in particular, to the impugned articles accessible by the hyperlinks contained in Mr. Newton's article.

[34] In this appeal, Mr. Crookes continues to maintain that there should be a presumption of publication in these circumstances. In support of his submission, Mr. Crookes refers to the following passage from the 10th edition of *Gatley on Libel and Slander* (Patrick Milmo, Q.C. & W.V.H. Rogers, eds., 10th ed. (London: Sweet & Maxwell, 2004)) at 6.13, under "Proof of Publication":

The fundamental principle is that the matter must be communicated to a third party in such a manner as to be capable of conveying the defamatory imputation about the claimant. However, it is not necessary in every case for the claimant to prove directly that the words complained of were brought to the actual attention of some third person in this sense. If he proves facts from which it can be inferred that the words were brought to the attention of some third person, he will establish a prima facie case. This is particularly obviously so where the matter is contained in a book or distributed in the news media or on the internet where in practice it would seem impossible to rebut the inference and in such a case it would seem that the presumption of publication would be impossible to displace. [Emphasis added.]

[35] It is interesting to note, however, that the 11th edition of *Gatley* (2008) took a more cautious approach to this subject by removing the italicized words ("or on the internet") from the above passage, and adding the following:

However, it has been held that in the case of material placed on the Internet there is no basis for a presumption of law that there has been publication to a substantial number of persons within the jurisdiction, though evidence of the number of times the site was accessed may justify the trier of fact in drawing

the inference that a substantial number of persons did read the material complained of.

[36] In coming to the conclusion that there was no presumption of publication on these facts, the trial judge relied on *Crookes v. Holloway*, 2007 BCSC 1325, 75 B.C.L.R. (4th) 316, aff'd in *Crookes v. Yahoo! Inc.*, 2008 BCCA 165 (*sub nom. Crookes v. Holloway*), 77 B.C.L.R. (4th) 201 [*Holloway*]. There, Mr. Crookes argued that there should be a presumption of publication in British Columbia with respect to alleged defamatory material found on the Yahoo Inc.! site. The trial judge in *Holloway* rejected that submission and dismissed the action for want of jurisdiction. This Court upheld her decision. With respect to Mr. Crookes' argument that there should be a presumption of publication, Mr. Justice Lowry, speaking for the Court, stated, at para. 6 of the decision:

[6] In *Wiebe [v. Bouchard]*, 2005 BCSC 47, 46 B.C.L.R. (4th) 278] significance was attached to the fact the libellous statements were posted on the internet nationwide as well as being made available in the main public library in Victoria. But they were posted on a Government of Canada website and, as was noted, were made available to everyone in the country who had a computer. By contrast, the statements that are the subject of Mr. Crookes' action were posted on a website with restricted access that was not available to the public. The basis for any presumption that might be said to have been recognized in *Wiebe* does not exist here. I do not consider the mere fact a statement was posted on a website with the kind of restricted access there was in this case supports the presumption it was read by anyone in British Columbia. [Emphasis added.]

[37] Mr. Justice Lowry went on to state that he found no error in the trial judge's finding in that case that there was no evidence to support an inference of publication.

[38] On appeal, Mr. Crookes has not relied on the *Wiebe* decision, but he again seeks to distinguish the *Holloway* decision on the basis that Mr. Newton's site has unrestricted access, thus arguably providing a stronger basis for finding a presumption of publication of the material found on it.

[39] Given the apparent lack of difficulty in establishing the number of times the primary site was accessed in this case, I do not see how it furthers Mr. Crookes' case for him to say that Mr. Newton's p2pnet site has world-wide accessibility (except to distinguish the case from *Holloway*). It may have world-wide accessibility, but it is an accepted fact that it had been accessed 1,788 times. It follows that the links to those articles on p2pnet have been accessed no more than 1,788 times. In any event, the critical question is not whether there is a presumption of publication of Mr. Newton's article, but whether there is a presumption of publication with respect to the hyperlinked websites and articles.

[40] There are undoubtedly world-wide sites dealing with topics which are of no interest to anyone except the author. There are others which are probably viewed millions of times each day. It may be that in the latter case, a presumption of publication could arise with respect to a particular site. A presumption of publication of articles hyperlinked to such a site, however, would still be one-step (or one click) removed.

[41] I agree with the trial judge that there is no sound basis for finding a presumption of publication of the hyperlinked articles in this case. None of the authorities relied on by Mr. Crookes provides a persuasive basis for such a presumption. Assuming there may be compelling reasons for a presumption of publication with respect to materials distributed on the Internet, and, in particular, with respect to hyperlinked materials (and this Court is not in a position based on the evidence in this case to make such a determination), that is a matter which may more readily be determined by the Legislature, rather than by the courts in the first instance. Courts are restricted to the record before them which, in many cases, does not permit the appropriate weighing of values and interests which should be taken into account when a change in the law such as this is advocated. The continuing evolution of the Internet is a phenomenon which raises many complex questions with far-reaching implications on an international scale. I would be loathe to venture into this area without a better compass than has been provided in this case.

[42] In the result, I agree with the trial judge that there is no presumption of publication of hyperlinked articles; that is, there is no presumption that a reader who accesses an internet source containing hyperlinks also accessed the articles found at the hyperlinked source. Nor do I find any persuasive basis for creating such a presumption on the facts of this case.

[43] Before concluding this point, I note that the trial judge referred to an English authority, *Amoudi v. Brisard*, [2006] EWHC 1062, All E.R. 294 (Q.B.), which, in turn, referred to *Jameel v. Dow Jones*, [2005] EWCA Civ. 75, [2005] Q.B. 946, as supportive of his conclusion that there is no presumed publication of material distributed on the Internet. Mr. Crookes submits that the trial judge erred in his discussion of those cases by stating that substantial publication (rather than publication to one person other than the plaintiff) is required in England. I agree with Mr. Newton that, whether or not the trial judge erred in making that statement, he was correct in finding that those authorities support the proposition that, in England, there is no presumption of publication (substantial or otherwise) with respect to Internet publications.

[44] In this case, having correctly concluded that there is no presumption of publication of the hyperlinked materials, the trial judge went on to consider whether, nonetheless, Mr. Newton could be found to have published the impugned articles by hyperlinking them to his free speech article. I now turn to that question.

(b) Hyperlinking as a Form of Publication by Mr. Newton

[45] At the outset of this discussion, it is important to note that the trial judge did not purport to hold that placing a hyperlink on an internet document can never amount to publication of the materials found at the hyperlink. Rather, he restricted himself to the facts of this case and found that, in these circumstances, Mr. Newton's use of a hyperlink to the openpolitics and usgovernetics sites where the impugned articles are found did not amount to publication by him of the hyperlinked articles.

[46] A “user-friendly” overview of the nature of Internet communications is found in the judgment of Kirby J. in *Gutnick*, who was responding to the appellant’s submission in that case that the Internet is such a different medium of communication that it required a reconsideration of the common law with respect to the law of defamation. At paras. 80-83 of the decision, Kirby J. stated:

[80] ...The Internet is essentially a decentralised, self-maintained telecommunications network. It is made up of inter-linking small networks from all parts of the world. It is ubiquitous, borderless, global and ambient in its nature. Hence the term “cyberspace”. This is a word that recognises that the interrelationships created by the Internet exist outside conventional geographic boundaries and comprise a single interconnected body of data, potentially amounting to a single body of knowledge. The Internet is accessible in virtually all places on Earth where access can be obtained either by wire connection or by wireless (including satellite) links. Effectively, the only constraint on access to the Internet is possession of the means of securing connection to a telecommunications system and possession of the basic hardware.

[81] *The World Wide Web*: The Web is a forum consisting of millions of individual “sites”. Each site contains information provided by, or to, the creator of that site. When a publisher of information and opinion wishes to make its content available on the Web, it commonly does so by creating a “website” and “posting” information to that site. Such a website is a collection of electronic messages maintained on a type of computer known as “web server”. Typically, this is controlled either by the publisher concerned or by a third party contracted by the publisher to provide “web hosting” services.

[82] An Internet user may access the information maintained on a website provided the user knows, or can ascertain, the Internet address of the relevant website. By entering that address into the user’s web browser, the user will be directed to that website. Once the user locates the website in this way, the user may be required to take additional steps to access information stored on the web server associated with the website. Thus, to post an article to a website, a publisher must prepare a version in digital (computer readable) format. Such an article becomes part of the digital collection of data known as a web page. Such a web page is transmitted to a web server. It, along with the other web pages, comprises the website.

[83] By posting information on a website, the publisher makes the content available to anyone, anywhere, having access to the Web. However, accessibility will depend on whether there is open access (under which any web user can access the site); subscription access (under which only web users who register, and commonly pay, for the service can secure access); combination access (where only a portion of a site may be accessed after registration and/or payment of a fee) and restricted access (access limited to specified users authorised by the website operator to view the website, eg employees of a particular company). [Footnotes omitted.]

[47] As earlier stated, Mr. Newton's site, p2pnet, is available worldwide to any Internet user who accesses his site. Thus, any user who goes to his site may readily access the Wayne Crookes article on the usgovernetics site and the openpolitics site by simply clicking on the hyperlinks in the p2pnet site.

[48] It is a significant feature of hyperlinking that the author of the original article makes a considered choice to hyperlink to another website or web article. (I am not dealing here with hyperlinks which may be added to a site by someone other than the website owner.) One would have thought that an author who creates such a hyperlink has some idea of what is contained on the linked site, and considers it relevant to the main article; otherwise why create the link? Here, however, Mr. Newton deposed that he had not read the hyperlinked articles prior to linking them to his article. In any case, the fact remains that it is this feature of choice in creating the hyperlink which distinguishes Mr. Newton's linkage to the Wayne Crookes article and the openpolitics site from the linkage provided, for example, by ISPs when they are acting as a mere conduit of information found on their sites (who have been found in many cases not to be liable as publishers).

[49] In order to place the hyperlinks here in context, I will quote from Mr. Newton's article found at his p2pnet site:

This is just short heads-up to let you know the number of p2pnet story posts may go down over the next little while.

That's because the Freedom of Expression in Canada campaign, kick-started by the libel suit brought against me by, initially, Sharman Networks and, latterly, by Kazaa ceo Nikki Hemming alone, is gathering momentum.

...

Under new developments, thanks to the lawsuit, I've just met Michael Pilling, who runs OpenPolitics.ca. Based in Toronto, he, too, is being sued for defamation. This time by politician Wayne Crookes.

We've decided to pool some of our resources to focus more attention on the appalling state of Canada's ancient and decrepit defamation laws and tomorrow, p2pnet will run a post from Mike [Pilling] on his troubles. He and I will also be releasing a joint press statement in the very near future.

[50] The underlined words “OpenPolitics.ca” and “Wayne Crooks” are hyperlinked to Mr. Newton’s article. The hyperlink to Wayne Crooks, if clicked, takes the user to a site posted on the usgovernetics website, and contains material which Mr. Crookes claims is defamatory. The hyperlink to OpenPolitics.ca connects the reader to a website containing a series of interlinked articles which contain materials Mr. Crookes claims are defamatory. It is unnecessary to repeat the contents of those articles, since the question of whether they are in fact defamatory of Mr. Crookes is assumed for the purpose of this appeal.

[51] Mr. Newton’s article, which is ten paragraphs long, ends with the word “Jon”. It is followed by an invitation to “Post a Comment To This Story” and with a reference to other websites which are not in issue.

[52] Mr. Crookes sent an email to Mr. Newton dated August 18, 2006, headed “URGENT LEGAL DEMAND” advising Mr. Newton that his links to usgovernetics and openpolitics libelled him; that Mr. Newton had a responsibility for the libel on the websites he linked, and requesting Mr. Newton to remove the links. Mr. Newton did not reply. Although the email was sent to Mr. Newton’s correct email address, he deposed that he had not read it.

[53] On October 31, 2006, Mr. Crookes’ lawyer sent a letter to Mr. Newton headed “Re: Wayne Crookes and openPolicitics.ca”, again advising that Mr. Crookes took the position that the hyperlinked article “Wayne Crookes” on the usgovernetics website was defamatory, suggesting Mr. Newton consult a lawyer, and again requesting Mr. Newton to remove it. By email dated November 9, 2006, Mr. Newton confirmed that he would not be removing the hyperlinks to either site.

[54] In his affidavit in support of his application to dismiss the action, Mr. Newton deposed that he saw hyperlinks “as the equivalent of a footnote or bibliographical reference” and went on to depose (in argument disguised as evidence) that there are good reasons for not making authors who hyperlink other websites or articles responsible for the content of the hyperlinked materials. In answer to interrogatories, Mr. Newton further deposed that he created the link because “It’s

standard internet, and p2pnet, procedure to link pages referred to in posts.” He denied having read the openpolitics articles concerning Mr. Crookes prior to creating his own link to that site. In answer to the question why he refused to remove the hyperlinks from his website after being requested to do so, Mr. Newton deposed that “I saw no need. It was merely a hyperlink.”

[55] It was in this context that the trial judge concluded that Mr. Newton’s use of hyperlinks in his article did not amount to publication by him of the articles found at those links. He accepted Mr. Newton’s argument that the manner in which he used the hyperlinks was analogous to a bibliographical footnote and concluded that an author who provides such a footnote in an article does not thereby become a publisher of the material contained at the footnoted source. In his view, the only difference between a footnote and a hyperlink is the ease with which a hyperlink can be accessed – simply by the click of a mouse (or key).

[56] In coming to the conclusion that Mr. Newton’s use of hyperlinking in this case did not amount to publication by him of the material found at those sites, the trial judge placed considerable reliance on the reasoning of this Court in *Carter*. There, the plaintiff sued the defendant, the B.C. Federation of Foster Parents Assn. (the “Federation”), and others with respect to defamatory articles contained in two internet “forums” or “chat rooms”. One forum was under the control of the Federation (the “Federation Forum”); the other, the “Bopeep Forum” was not. A group of individual defendants comprising the B.C. Foster Care Support Network (the “Network”) had prepared a written newsletter which contained an Internet address for the Bopeep Forum, and the comment that “more news” could be found at that address. This newsletter was distributed by the Federation to its board members. An issue arose as to whether the Federation thereby became liable, as a publisher, for the defamatory comments found at the Bopeep site.

[57] The trial judge found that the reference in the written newsletter to the Bopeep Forum website did not in the circumstances amount to publication by the Federation of the defamatory materials found at that site. This Court agreed with the

trial judge. The relevant part of this Court's decision in that respect is found at paras. 10-13:

[10] The appellant argues, making special reference to the case of *Hird v. Wood* (1894), 38 S.J. 234 (C.A.), that the respondent Federation should have been found liable for referring recipients of the Network newsletter to the website where the offensive comments could be found. The *Hird* case concerned an application for a new trial of a libel action. The plaintiff appellant owned a number of cottages in a village and lived in one of the cottages. A new business was set up by boiler makers near to the cottages and the plaintiff obtained an injunction to restrain the carrying on of the business in such a way as to be injurious to his property and as a result the boilermakers' business terminated. Certain individuals in the neighbourhood were displeased by this result and decided to take up a subscription for the persons whose business had been terminated. On a public occasion, a placard was set up containing a notice that subscriptions might be donated to the former owners of the business "who have been ruined in their business and their living taken away by the animosity of one man". I take it from the report of the case that it was common ground that the one man referred to was the plaintiff appellant. Throughout the first trial there was no evidence as to who wrote the words on the placard or who erected it, but it was proven that the defendant took up a position near to the placard and remained there pointing at the placard with his hand and attracted attention of passers-by to the placard. At the first trial, the presiding judge held that there was no evidence of publication and directed a verdict for the defendant. The Court of Appeal held that there was evidence of publication sufficient to be passed on by a jury and ordered a new trial.

[11] In the course of his reasons, Taylor J. made reference to *Tacket v. General Motors Corp.*, 836 F.2d 1042 (U.S. 7th Cir. Ind. 1987). In that case, it was held that where a sign defamatory of the plaintiff was left on a plant wall for several months, it was a question of fact for a jury to decide whether or not the defendant employer could be found liable for defamation of the plaintiff employee. Obviously in that case, the employer had control over the plant premises. In the instant case, there is no suggestion that the Federation had any measure of control relative to the Bopeep Forum. Thus the *Tacket* case affords little assistance in this case.

[12] In my opinion, the factual situation here is closer to the situation found to exist in the New York cases of *MacFadden v. Anthony*, 117 N.Y.S.2d 520 (U.S. N.Y. Sup. Ct. 1952) and *Klein v. Biben*, 296 N.Y. 638 (Ct. App. 1946), referred to by the trial judge where the courts held reference to an article containing defamatory comment without repetition of the comment itself should not be found to be a republication of such defamatory comment.

[13] Unlike the situation found in the *Tacket* case, there was here no element of control by the Federation over the Bopeep Forum and the facts of the instant case are quite distinguishable from the situation found to exist in the *Hird* case. In *Hird*, the defendant took active steps to draw the attention of persons to the defamatory placard. I should say that the defendant there was taking active steps to publish to the world the defamatory material

contained on the placard. I do not believe the circumstances extant there can be successfully analogized to the instant case. I take note of the fact that this was a reference in a printed newsletter to a website and I would limit the effect of this case to that factual situation. Whether a different result should obtain concerning an internet website that makes reference to another website I would leave for decision when that factual circumstance arises. In the result, I am not persuaded that the learned trial judge made any error in his assessment of this aspect of the matter and I would dismiss the appeal on this issue concerning the Bopeep Forum.

[58] I agree with the trial judge that the reasoning of this Court in *Carter* supports Mr. Newton's position that the mere fact that he hyperlinked the impugned sites does not make him a publisher of the material found at the hyperlinked sites. Apart from the question of control, (to which I will refer later in these reasons), it is difficult, in principle, to distinguish the act of creating the hyperlinks to the impugned articles in this case from the act of circulating a website address in the newsletter to the Bopeep Forum. As noted by the trial judge, the only notable difference is that somewhat more effort would be required by a person reading the newsletter to type in the Bopeep website and thereby access the site, than to access the websites hyperlinked by Mr. Newton in his article, which could be done in an instant by clicking on the hyperlink. In both cases, the defendants chose to circulate articles linked with the impugned websites in a manner which made the referenced sites readily accessible to anyone who chose to follow the link, whether by typing in the website (in the case of the newsletter) or clicking on the hyperlink (in this case). Thus, although this Court in *Carter* said that it was leaving this issue open, I find that the opening is very narrow.

[59] I also agree with the trial judge, however, that hyperlinking may, in some cases amount to publication by the person creating the link. If it is apparent from the context in which the hyperlink is used that it is being used merely as a bibliographical or similarly limited reference to an original source, without in any way actively encouraging or recommending to the readers that they access that source, then, following *Carter*, I accept that this would not amount to publication.

[60] It is not sufficient, however, for the creator of a hyperlink to simply depose that he intended the link to be in the nature of a “footnote” in order to avoid liability for publication. While the trial judge appears to have limited the footnote analogy to a footnote which simply provides a source reference (similar to a citation to a legal source utilized regularly by judges), many authors use footnotes (and citations) in a much more expansive way. For that reason, I would not accept the footnote analogy to be a complete answer to the question of whether a hyperlink constitutes publication. More significant factors would include the prominence of the hyperlink, any words of invitation or recommendation to the reader associated with the hyperlink, the nature of the materials which it is suggested may be found at the hyperlink (for example, if the hyperlink obviously refers to a scandalous, or obscene publication), the apparent significance of the hyperlink in relation to the article as a whole, and a host of other factors dependant on the facts of a particular case.

[61] The question remains whether, in the absence of a presumption of publication, and accepting that the mere fact of hyperlinking defamatory materials does not constitute publication, there was a factual foundation which would justify an inference of publication of the hyperlinked articles by Mr. Newton. Here, having stated that the hyperlinks in this case were analogous to footnotes, and that there was no express invitation in the original article for the reader to visit the hyperlinks, the trial judge concluded that there was no publication by Mr. Newton, even if the hyperlinks were followed. It does not appear he took any other factors into account in coming to this conclusion. Since Mr. Crookes has argued that the trial judge erred in failing to find publication by inference, I will examine that issue more closely.

(c) Publication by Inference from the Evidence

[62] The trial judge concluded that Mr. Crookes had not established that there had been communication of the alleged libel to a third party. In particular, he observed that Mr. Crookes had not led evidence from any third party that he or she had accessed the hyperlinks in Mr. Newton’s article and read the impugned articles. In

other words, he correctly found that there was no direct evidence of publication to a third party.

[63] There was, however, evidence that Mr. Newton's website which contained the hyperlinks to the impugned articles had been "viewed" (a word which counsel preferred to the word "hit" for reasons which remain unclear to me) 1,788 times. The evidence with respect to this "fact" is that of Mr. Newton, who stated in answer to interrogatories that:

At the time of writing (3:19 pm, February 1, 2008), it [his article] had been viewed a total of 1,788 times. Whether any of those viewings were by humans as opposed to internet software "robots" and whether any of them clicked on any hyperlink, I do not know.

[64] In answer to a question from the Court, the Court was advised that it is common for ISPs to use software robots to seek and collect information from various sites for a variety of purposes.

[65] No evidence was led as to the possibility of determining whether those who accessed Mr. Newton's p2pnet article also accessed the hyperlinks.

[66] Since there is no presumption of publication with respect to Mr. Newton's article, including the articles accessible via the hyperlinks, the onus was on Mr. Crookes to prove, on a balance of probabilities, that the hyperlinks contained in Mr. Newton's article (or at least one of them) were accessed by at least one person who read the article or articles. Such proof does not require direct evidence from a third person who used the hyperlinks to access the impugned articles. As stated by Ritchie J., speaking for the majority, in *Gaskin v. Retail Credit Co.*, [1965] S.C.R. 297, at 300, 49 D.L.R. (2d) 542:

It was strongly contended by counsel for the respondent that the English cases referred to in *Button on Libel and Slander* and in other text-books established an exhaustive and closed category of circumstances from which publication could be inferred and it appears that McGillivray J.A. subscribed to this view.

In my opinion, however, the general principle is correctly stated in *Gatley on Libel and Slander*, at p. 89, where it is said:

It is not necessary for the plaintiff in every case to prove directly that the words complained of were brought to the actual knowledge of some third person. If he proves facts from which it can reasonably be inferred that the words were brought to the knowledge of some third person, he will establish a prima facie case.

[67] In *Gaskin*, there was no evidence of letters containing allegedly defamatory credit reports having been posted, or having been received by the addressees, but the majority found that it was open to the jury to infer that the reports prepared by the credit company, which was in the business of preparing and sending such credit reports to customers, had likely been received and read by them.

[68] While the drawing of inferences of fact or law is nothing new to trial judges in the context of the many cases which come before them, the language used by the trial judge in this case indicates that he was of the view that there was no evidence from which he could infer publication in these circumstances. This is indicated by the following language employed by him at para. 20 of his reasons for judgment:

[20] Regardless, the issue in this case is not how accessible the website is, but rather, if anyone followed the hyperlinks posted on the p2pnet site. Without proof that persons other than the plaintiff visited the defendant's website, clicked on the hyperlinks, and read the articles complained of, there cannot be a finding of publication. As in *Crookes v. Holloway*, the plaintiffs have not adduced any evidence to support this claim. [Emphasis added.]

[69] In coming to this conclusion, the trial judge appears to have adopted Mr. Newton's argument, set out at para. 10 of the reasons for judgment, that "there is no evidence that any person followed the hyperlinks in question or read the words that are complained of. The plaintiffs have therefore failed to prove publication ...".

[70] In my view, the trial judge erred in failing to consider all of the evidence in determining whether an inference of publication could be drawn in these circumstances. Unlike the situation in *Holloway*, there was some evidence in this case from which such an inference could be drawn. In particular, there was evidence that Mr. Newton's article had been viewed 1,788 times. Further, since Mr. Newton's p2pnet site emphasizes free speech issues, it is reasonable to assume

that a significant number of those who accessed the “Free Speech in Canada” article were also interested in free speech issues. Mr. Newton encouraged his readers’ ongoing interest in the subject of Mr. Crookes lawsuit against Mr. Pilling by stating that he would “run a post from Mike [Pilling] on his troubles.” Given the fact that the import of Mr. Newton’s article is that defamation suits are a form of attack on free speech, and his reference to defamation suits relating to this issue, it is also reasonable to assume that at least one of those viewers also went to one or both of the hyperlinked sites and read one or more of the articles. Or, to put it another way, it seems unlikely that of the 1,788 who chose to access Mr. Newton’s article on free speech, not one would have chosen to access and read the impugned articles contained at one or more of the hyperlinks. (In coming to this conclusion, I accept that some of the “viewers” of the p2pnet site may have been software robots.)

[71] While the evidence of invitation to visit the hyperlinks was more subtle than a statement in the original article that “the truth about Crookes can be found here”, I find that the number of “views” of the original site, the fact that the article deals with free speech and defamation, and the reference to lawsuits involving Mr. Crookes, would have served as words of encouragement, or an invitation, to a person viewing Mr. Newton’s article to look further. In other words, I do not accept that the hyperlinks, when viewed in the context of the Newton article as a whole, operated as a “mere” bibliographical” footnote.

[72] In summary on this point, I find that the trial judge erred in failing to draw an inference on all of the evidence that Mr. Crookes had established publication of the hyperlinked articles to at least one third party.

(d) A Further Issue

[73] Mr. Crookes raised one further issue with respect to the issue of publication. This issue relates to the fact that Mr. Newton had control over the presence of the hyperlinks on his p2pnet website, that he was advised of the defamatory nature of the material found at the hyperlinked sites, and that he refused to remove the hyperlinks when requested to do so by Mr. Crookes and his lawyer. Mr. Crookes

suggests that these facts provide an additional basis for finding that Mr. Newton was a publisher of the impugned articles found at the hyperlinked sites.

[74] The significance of this issue is alluded to by the trial judge in *Carter (v. BC Federation of Foster Parents Assn. et al.*, 2004 BCSC 137, 27 B.C.L.R. (4th) 123 at paras. 52-54), quoted at para. 9 of this Court's decision:

The law has held liable those who perpetuate defamatory comments by permitting such comments to remain at premises controlled by them even though they did not author or authorize the original publication. See *Byrne v. Deane*, [1937] 2 All E.R. 204, *Hellar v. Bianco*, 111 Cal. App. (2d) 424 (Cal. 1952), *Tacket v. General Motors Corp.*, 836 F. (2d) 1042 (7th Cir. 1987).

Additionally, liability has been found where a defendant wilfully directed others to defamatory statements when he neither authored nor authorized their publication on premises not controlled by him. See *Hird v. Wood* (1894), 38 S.J. 234 (C.A.).

Common to each of these two lines of authorities is that the defendant had knowledge of the defamatory words and it lay within his power to remove the offending words and he failed to do so or he directed others to the words.

[75] In addition to the authorities referred to in the first paragraph of this extract with respect to this point, Mr. Crookes referred to *Godfrey v. Demon Internet Ltd.*, [2001] QB 201, [2000] 3 W.L.R. 1020, *Bunt v. Tilley*, [2006] EWHC 407, [2007] 1 W.L.R. 1243 (Q.B.), and, by analogy, *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427.

[76] The trial judge did not deal with this issue or these authorities in his reasons for judgment. Nor did Mr. Newton address this issue in his factum. In these circumstances, and since I have otherwise found that Mr. Newton was a publisher of the impugned articles, it is unnecessary for me to address this issue. To the extent that it remains an issue in the ongoing proceedings between the parties, it may be dealt with by the trial court.

CONCLUSION

[77] I would allow the appeal, set aside the order of the trial judge, and remit the action to the trial court for resolution of all outstanding issues.

“The Honourable Madam Justice Prowse”

Reasons for Judgment of the Honourable Madam Justice Saunders:

[78] I have had the benefit of reading in draft form the reasons for judgment of Madam Justice Prowse. I agree, for the reasons she has given, there is no basis for finding a presumption of publication of the hyperlinked articles, and that “the mere fact [Mr. Newton] hyperlinked the impugned sites does not make him a publisher of the material found at the hyperlinked sites” (para. 58).

[79] I do not agree, however, that the trial judge erred in failing to infer publication to at least one party (para. 72). Nor do I agree the article by Mr. Newton served “as words of encouragement, or an invitation”, to a person accessing Mr. Newton’s site. In the result I would dismiss the appeal.

[80] There are two aspects to the publication element of the tort of defamation. The first, relating to the defendant as publisher, concerns the act of promulgating the impugned item. The second, relating to the third party receiver of the impugned item, concerns the receipt of that item by a person within the court’s jurisdiction. (I refer to the issue of jurisdiction because publication, to be actionable, must be within this jurisdiction, and publication of internet material occurs where the words are read: *King v. Lewis*, [2005] E.M.L.R. 45, C.A.; *Gutnick v. Dow Jones*, [2002] H.C.A. 56.) In my respectful view, the reasons for judgment of my learned colleague mix these issues as one.

[81] The first of these two aspects is whether, by creating the hyperlinks in question, Mr. Newton can be seen to have promulgated a writing or message that is defamatory of the appellant. A near case was considered by this Court in *Carter v. B.C. Federation of Foster Parents Assn.*, 2005 BCCA 398, 42 B.C.L.R. (4th) 1. The issue in *Carter* was whether the defendant, in publishing a web address at which the allegedly defamatory material was contained, had re-published that material. Mr. Justice Hall, for this Court, in holding it did not, said:

[12] In my opinion, the factual situation here is closer to the situation found to exist in the New York cases of *MacFadden v. Anthony*, 117 N.Y.S. (2d) 520 (Sup. Ct. 1952) and *Klein v. Biben*, 296 N.Y. 638 (Ct. App. 1946), referred to by the trial judge, where the courts held reference to an article containing defamatory comment without repetition of the comment itself should not be found to be a republication of such defamatory comment.

[82] While the circumstances of *Carter* differ from those before us, there is, in my view, no substantial difference between providing a web address and a mere hyperlink. Whether the hyperlink is a web address, as is often the case, or a more specific reference, both require a decision on the part of the reader to access another website, and both require the reader to take a distinct action, in the one case typing in a web address and in the other case clicking on the hyperlink. In other words, there is a barrier between the accessed article and the hyperlinked site that must be bridged, not by the publisher, but by the reader. The essence of following a hyperlink is to leave the website one was at to enter a different and independent website.

[83] Nor am I persuaded that in this era of rapidly changing technology we should assume access from a mere web address mentioned in an article will require any more effort than from a hyperlink. It is easy to contemplate a program whereby a click of a computer mouse engages a program on the reader's computer that effects the same result as a hyperlink. In other words, I agree with my colleague's conclusion at para. 58:

I agree with the trial judge that the reasoning of this Court in *Carter* supports Mr. Newton's position that the mere fact he hyperlinked the impugned sites does not make him a publisher of the material found at the hyperlinked sites.

[84] I agree, as well, that the circumstances of a case may add more so as to demonstrate that a particular hyperlink is an invitation or encouragement to view the impugned site, or adoption of all or a portion of its contents. For example, in *Hird v. Wood* (1894), 38 S.J. 234 (C.A.), referred to in *Carter*, evidence of the defendant pointing to a placard with content was held to be sufficient evidence of publication to go to a jury. So a statement to the effect "N is described at [hyper link]" may itself incorporate a libel so as to be defamatory.

[85] In the case before us, the judge held concerning the context of the hyperlinks:

[32] In the present case, although hyperlinks referred the reader to articles now claimed by the plaintiffs to be defamatory, the plaintiffs agree that the defendant did not publish any defamatory content on the p2pnet website itself. The defendant did not reproduce any of the disputed content from the linked articles on p2pnet and did not make any comment on the nature of the linked articles. In these circumstances, a reader of the p2pnet website who did not click on the hyperlinks provided would not have any knowledge of the allegedly defamatory content.

[33] As the Court of Appeal observed in *Carter*, citing the proposition of the New York cases *MacFadden v. Anthony* and *Kline v. Biben*, “reference to an article containing defamatory content without repetition of the comment itself should not be found to be a republication of such defamatory content”.

[86] In these observations, in my view, the judge was entirely correct.

[87] My colleague considers that the judge did not fully explore the context of the hyperlinks in determining Mr. Newton had not participated in publishing the impugned articles. In her view the fact Mr. Newton’s article containing the hyperlinks deals with free speech and defamation, and the fact it refers to lawsuits involving Mr. Crookes, serve “as words of encouragement, or an invitation”, to look further.

[88] For clarity, the article on Mr. Newton’s website under the headline “Free Speech in Canada” said:

Under new developments, thanks to the lawsuit, I’ve just met Michael Pilling, who runs OpenPolitics.ca. Based in Toronto, he, too, is being sued for defamation. This time by politician [Wayne Crookes](#).

[89] With respect, I see no encouragement or invitation from the fact the discussion concerns free speech and defamation. Nor, in my view, can reference to Mr. Crookes’ litigation reasonably have that effect. Those factors, at a minimum, alert the reader to the potential for untrue content or disputed commentary. They fall far short of a statement of approbation, or adoption, and appear to me to be most comparable to a footnote for a reader, or a card index in a library. It is not, as was suggested is sometimes the way in the recent case *Metropolitan Schools v. Google Inc.*, [2009] E.W.H.C. 1765 (Q.B.), a snippet from the article or a snippet produced by a search engine.

[90] On these considerations I conclude Mr. Newton was not a publisher because of his hyperlinks to the offensive article.

[91] The second aspect of publication is whether it can be inferred a person accessed the impugned articles by way of the hyperlinks. My colleague would conclude, from the fact of 1,788 “hits” of Mr. Newton’s article that at least one person within this jurisdiction, did so.

[92] In my view, the approach taken by my colleague to the effect that from the number of persons accessing Mr. Newton’s website it may be inferred that a person in this jurisdiction accessed the impugned articles by clicking on them, does not sustain scrutiny. In the context of internet life, we have no way to assess the volume of “hits” here compared to the norm, the usual behaviour of internet readers or “surfers”, or the jurisdiction in which they reside. The conclusion drawn by my colleague is, with respect, tantamount to a presumption that in the case of a website accessed to any significant extent, there has been communication of the offensive material. This is contrary to her conclusion on the issue of presumption, and one with which I do not agree. The conclusion effectively reduces the element of publication to the role of the publisher without consideration of the receipt of the impugned material. There may be cases in which more is known supporting such an inference, but such is not the case here where all that is before us is the bald number of hits. In my view there is an insufficient basis upon which to make such an inference, and the inference drawn cannot co-exist with the reasons for judgment on the matter of a presumption.

[93] Last, the appellant complains that Mr. Newton did not remove the hyperlinks when asked to do so. This is not a question considered by the judge, and findings of fact are not contained in the reasons for judgment to support a discussion of that interesting issue. But for my conclusion on the question of drawing an inference that a person clicked on the hyperlink, I would allow the appeal and remit this question to the trial court for determination. However, in view of my conclusion on the question of inference, I would dismiss the appeal.

“The Honourable Madam Justice Saunders”

I Agree:

“The Honourable Mr. Justice Bauman”

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Crookes v. Newton*,
2009 BCCA 392err1

Date: 20090918
Docket: CA036623

Between:

Wayne Crookes and West Coast Title Search Ltd.

Appellants
(Plaintiffs)

And

Jon Newton

Respondent
(Defendant)

Before: The Honourable Madam Justice Prowse
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Bauman

On Appeal from the Supreme Court of British Columbia, Vancouver Registry,
Docket No S072729, 2008 BCSC 1424, October 27, 2008

Counsel for the Appellants: R.A. Kasting

Counsel for the Respondent: D.W. Burnett

Place and Date of Hearing: Vancouver, British Columbia
May 25, 2009

Place and Date of Judgment: Vancouver, British Columbia
September 15, 2009

Date of Corrigendum: September 18, 2009

Corrigendum to Written Reasons by:
The Honourable Madam Justice Saunders

Madam Justice Saunders:

[1] In my reasons for judgment released September 15, 2009 the second sentence of paragraph 84 is to be deleted. Paragraph 84 will now read:

I agree, as well, that the circumstances of a case may add more so as to demonstrate that a particular hyperlink is an invitation or encouragement to view the impugned site, or adoption of all or a portion of its contents. For example, in *Hird v. Wood* (1894), 38 S.J. 234 (C.A.), referred to in *Carter*, evidence of the defendant pointing to a placard with content was held to be sufficient evidence of publication to go to a jury. So a statement to the effect “N is described at [hyper link]” may itself incorporate a libel so as to be defamatory.

The Honourable Madam Justice Saunders

Status:  Positive or Neutral Judicial Treatment

***457 Campbell v MGN Ltd**

House of Lords

6 May 2004

[2004] UKHL 22

[2004] 2 A.C. 457

Lord Nicholls of Birkenhead , Lord Hoffmann , Lord Hope of Craighead , Baroness Hale of Richmond and Lord Carswell

2004 Feb 18, 19; May 6

Confidential information—Disclosure—Public interest—Details of celebrity's private life—Celebrity averring publicly that she did not take drugs—Newspaper disclosing details of drug addiction treatment and publishing photographs of her leaving self—help group meeting—Whether violation of right to privacy—Whether justified in the public interest— [Human Rights Act 1998](#) (c 41), Sch. 1, Pt I, arts 8, 10

The claimant was an internationally famous fashion model who had courted publicity, volunteered information to the media about her private life and averred publicly, but untruthfully, that she did not take drugs. The defendant newspaper published articles which disclosed her drug addiction and the fact that she was receiving therapy through a named self-help group, gave details of group meetings she attended and showed photographs of her in a street as she was leaving a group meeting. The claimant sought damages against the newspaper for breach of confidentiality. She accepted that the newspaper was entitled to publish the fact of her drug addiction and the bare fact that she was receiving treatment, but alleged that the newspaper had acted in breach of confidence by obtaining and publishing the additional details of her therapy at the group meetings and the photographs, which had been taken covertly. The newspaper denied the claim on the ground that it was entitled, in the public interest, to publish the information in order to correct the claimant's misleading public statements and asserted that the information that was published about her treatment was peripheral and was not sufficiently significant to amount to a breach of the duty of confidence. Morland J gave judgment for the claimant and held, inter alia, that the information complained of was confidential and that, having regard to [section 12\(4\)](#) of the Human Rights Act 1998 ¹ and balancing articles 8 and 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms scheduled thereto, the publication was not justified in the public interest. The Court of Appeal allowed the newspaper's appeal and held that the disclosure of information that the claimant was receiving therapy from a self-help group could not be equated with disclosure of clinical details of medical treatment, that since it was legitimate for the newspaper to publish that the claimant was a drug addict and receiving treatment, the disclosure of the additional information complained of was peripheral and was not, in its context, particularly significant, and a reasonable person of ordinary sensibilities would not find its disclosure offensive, and that the published information complained of was a legitimate part of the journalistic package designed to demonstrate with the detail necessary to carry ***458** credibility that the claimant had deceived the public and that, therefore, the publication was justified in the public interest.

On the claimant's appeal—

Held, allowing the appeal (Lord Nicholls of Birkenhead and Lord Hoffmann dissenting), that the threshold test as to whether information was private was to ask whether a reasonable person of ordinary sensibilities, if placed in the same situation as the subject of the disclosure, rather than its recipient, would find the disclosure offensive; that, since the details of the claimant's therapy for her drug addiction related to the condition of her physical and mental health and the treatment she was receiving for it, they were akin to the private and confidential information contained in medical records and their publication required specific justification; that the assurance of privacy, confidentiality and anonymity were essential to the type of treatment that the claimant was undergoing, so that a person in her position would find disclosure highly offensive, and might also

be deterred from continuing with the therapy, thereby causing a setback to recovery; that therefore the details of the claimant's therapy constituted private information which gave rise to a duty of confidentiality; that the publication of that information went beyond disclosure which was necessary to add credibility to the legitimate story that the claimant had deceived the public and went beyond the journalistic margin of appreciation allowed to a free press; that although the photographs of the claimant were taken in a public place, the context in which they were used and linked to the articles added to the overall intrusion into the claimant's private life; that looking at the publication as a whole and taking account of all the circumstances the claimant's right pursuant to article 8 to respect for her private life outweighed the newspaper's right pursuant to article 10 to freedom of expression; and that, accordingly, publication of the additional information and the accompanying photographs constituted an unjustified infringement of the claimant's right to privacy for which she was entitled to damages (post paras 91-100, 105-113, 119, 121-125, 133-137, 141, 146-160, 165-171).

Douglas v Hello! Ltd [2001] QB 967, CA ; In re S (A Child) (Identification: Restrictions on Publication) [2004] Fam 43, CA and A v B plc [2003] QB 195, CA considered .

Decision of the Court of Appeal [2002] EWCA Civ 1373 [2003] QB 633; [2003] 2 WLR 80; [2003] 1 All ER 224 reversed .

The following cases are referred to in the speeches of their Lordships:

A v B plc [2002] EWCA 337; [2003] QB 195; [2002] 3 WLR 542; [2002] 2 All ER 545, CA

Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109; [1988] 3 WLR 776; [1988] 3 All ER 545, HL(E)

Aubry v Éditions Vice-Versa Inc [1998] 1 SCR 591

Australian Broadcasting Corp v Lenah Game Meats Pty Ltd [2001] HCA 63; (2001) 208 CLR 199

Bladet Tromsø and Stensaas v Norway (1999) 29 EHRR 125

Coco v A N Clark (Engineers) Ltd [1969] RPC 41

Douglas v Hello! Ltd [2001] QB 967; [2001] 2 WLR 992; [2001] 2 All ER 289, CA

Dudgeon v United Kingdom (1981) 4 EHRR 149

Fressoz and Roire v France (1999) 31 EHRR 28

Goodwin v United Kingdom (1996) 22 EHRR 123

Hellewell v Chief Constable of Derbyshire [1995] 1 WLR 804; [1995] 4 All ER 473

Hosking v Runting [2003] 3 NZLR 385; [2004] NZCA 34

Jersild v Denmark (1994) 19 EHRR 1

Observer and Guardian v United Kingdom (1991) 14 EHRR 153

P v D [2000] 2 NZLR 591

Peck v United Kingdom (2003) 36 EHRR 719

Prince Albert v Strange (1849) 2 De G & Sm 652; 1 Mac & G 25 *459

PG and JH v United Kingdom Reports of Judgments and Decisions 2001-IX, p 195

R v Broadcasting Standards Commission, Ex p British Broadcasting Corpn [2001] QB 885; [2000] 3 WLR 1327; [2000] 3 All ER 989, CA

R v Dyment [1988] 2 SCR 417

Reynolds v Times Newspapers Ltd [2001] 2 AC 127; [1999] 3 WLR 1010; [1999] 4 All ER 609, HL(E)

S (A Child) (Identification: Restrictions on Publication), In re [2003] EWCA Civ 963; [2004] Fam 43; [2003] 3 WLR 1425, CA

Spencer (Earl) v United Kingdom (1998) 25 EHRR CD 105

Tammer v Estonia (2001) 37 EHRR 857

Venables v News Group Newspapers Ltd [2001] Fam 430; [2001] 2 WLR 1038; [2001] 1 All ER 908

Wainwright v Home Office [2003] UKHL 53; [2004] 2 AC 406; [2003] 3 WLR 1137; [2003] 4 All ER 969, HL(E)

Z v Finland (1997) 25 EHRR 371

The following additional cases were cited in argument:

Designers Guild Ltd v Russell Williams (Textiles) Ltd (trading as Washington DC) [2000] 1 WLR 2416; [2001] 1 All ER 700, HL(E)

Kaye v Robertson [1991] FSR 62, CA

Lion Laboratories Ltd v Evans [1985] QB 526; [1984] 3 WLR 539; [1984] 2 All ER 417, CA

APPEAL from the Court of Appeal

The claimant, Naomi Campbell, appealed by leave of the House of Lords (Lord Bingham of Cornhill, Lord Scott of Foscote and Lord Rodger of Earlsferry) granted on 25 February 2003, from a decision of the Court of Appeal (Lord Phillips of Worth Matravers MR, Chadwick and Keene LJ) on 14 October 2003, allowing an appeal by the defendants, MGN Ltd, from a decision of Morland J [2002] EWHC 499 (QB), who on 27 March 2002 gave judgment for the claimant and awarded her £3,500 damages and an injunction in her action against the defendants for breach of confidence and breach of the duty

under [section 4\(4\)](#) of the [Data Protection Act 1998](#) in respect of articles published in the "Mirror" newspaper on 1 and 5 February 2001.

The facts are stated in the speeches of their Lordships.

Andrew Caldecott QC, *Antony White QC* and *Catrin Evans* for the claimant. It is a fundamental requirement of the law of confidence that there is some disclosure or misuse of material whose confidentiality the claimant seeks to protect. The duty lies in an obligation of conscience rather than any right of property. A duty of confidence may arise independently of any preceding transaction or relationship between the parties. A pre-existing relationship of confider and confidant is not necessary. It is sufficient if confidential information comes into the possession of a person in circumstances where that person has notice that the information is confidential. As the Court of Appeal recognised, since the Human Rights Act 1998 came into force information may be described as "confidential" not because it has been confided by one person to another but because it relates to an aspect of a person's private life which he does not choose to make public. Personal privacy is a value which the law of confidence can in principle protect moreover the court is obliged to have regard to the right to respect for private and family life guaranteed by article 8 of the European **460* Convention for the Protection of Human Rights and Fundamental Freedoms.

The law of confidence should protect from disclosure private information where its publication has a real potential to adversely affect a person's health or mental well-being, even if the information does not come within the established category of medical treatment. The emphasis on health is reflected in clause 3(i) of the Press Complaints Commission Code of Practice ("the PCC Code").

However, a capacity for specific harm to the claimant is not a requirement of confidentiality or of relief since privacy is in itself a value meriting protection. [Reference was made to *Prince Albert v Strange* (1849) 2 De G & Sm 652; 1 Mac & G 25 ; [A v B plc \[2003\] QB 195](#) ; [Attorney General v Guardian Newspapers Ltd \(No 2\) \[1990\] 1 AC 109](#) ; [Earl Spencer v United Kingdom \(1998\) 25 EHRR CD 105](#) and [Lion Laboratories Ltd v Evans \[1985\] QB 526](#) .]

The mere taking of photographs is not of itself actionable save where the photographing itself represents a misuse of confidential information, and does not involve disclosure. But photographs have a special intrusive effect in conveying visual information which words alone cannot achieve. Photographs are a record of a frozen moment and therefore have a permanence and presentational power which the human eye and words alone cannot capture. In determining whether photographs taken in a public place are capable of protection, it is relevant to take into account, by reference to the context in which the photographs were taken and published, (a) whether and to what extent the person photographed had a reasonable expectation of privacy in relation to their subject matter, and (b) whether the photographs were taken surreptitiously. Clause 3(i) of the PCC Code, to which the court must have regard by virtue of [section 12\(4\) of the 1998 Act](#) , acknowledges that a person may have a reasonable expectation of privacy in a public place. Whether or not there is an expectation of privacy is fact-sensitive. But it would be wholly unrealistic to ignore the purpose for which the photographs were taken and the context in which they were published. The information conveyed by photographs has to be judged by reference to the captions and surrounding text. A cause of action arises upon the *publication* of surreptitiously taken photographs regardless of whether the *taking* of the photographs was actionable. [Reference was made to [Douglas v Hello! Ltd \[2001\] QB 967](#) and *Peck v United Kingdom* (2003) 36 EHRR 719 .] Assessment of the photographs required considering the intrusive effect of their publications and not merely the information they conveyed.

The law of confidence does not protect the trivial. The court has a duty to strike a fair balance between the competing rights of the claimant to respect for private life under article 8 and of the defendant to freedom of expression under article 10 of the Convention. Since neither article 8 nor article 10 has pre-eminence over the other the court has to consider the proportionality of the proposed interference with each right in turn, weighing those features which enhance the importance of each right in the particular case. [Reference was made to [In re S \(A Child\) \(Identification: Restrictions on Publication\) \[2004\] Fam 43](#) and *Fressoz and Roire v France* (1999) 31 EHRR 28 .]

There is no public interest in publishing information merely because its subject is a well known person. The article in question contained the **461* information that the claimant was a drug addict, that she was receiving treatment, and that she was attending Narcotics Anonymous, the details of that treatment and photographs of her leaving Narcotics Anonymous with other patients after having had treatment. The claimant could not complain of the exposure of her drug-taking but the Court of Appeal erred in holding that the details of the claimant's treatment and attendance at Narcotics

Anonymous and the photographs were not private and confidential and that the article could not credibly have been written without the inclusion of that material. The disclosure of the material would tend to endanger the claimant's health, mental stability and treatment. The more intimate the aspect of private life being interfered with, the more compelling the reasons for interference must be. [Reference was made to [Dudgeon v United Kingdom \(1981\) 4 EHRR 149](#) .] The Court of Appeal should not have interfered with the judge's decision on that issue. [Reference was made to [Designers Guild Ltd v Russell Williams \(Textiles\) Ltd \(trading as Washington DC\) \[2000\] 1 WLR 2416](#) .]

Desmond Browne QC and Richard Spearman QC for the defendants. When a public figure chooses to make untrue statements about her private life the press is entitled to set the record straight. Disclosure is justified when it serves to prevent members of the public from being misled. There is a margin of latitude in what journalists are entitled to publish. The photographs and the details about the claimant's treatment exposed the claimant's lies and demonstrated that the defendants had the necessary evidence. In view of the claimant's concession at the trial there was nothing in the peripheral details of the article to which the law of confidence could attach. The fact that the information was obtained by covert or surreptitious means does not mean that the information was confidential. In law the claimant has no ground for complaining that she was photographed without her consent in a public place. [Reference was made to [Hosking v Runting \[2003\] NZLR 385](#) ; [Wainwright v Home Office \[2004\] 2 AC 406](#) ; [Fressoz and Roire v France 31 EHRR 28](#) ; [Jersild v Denmark \(1994\) 19 EHRR 1](#) and [Peck v United Kingdom 36 EHRR 719](#) .]

The law of confidence does not protect useless information or trivia. It only bites on information which is significant or of substantial concern to the claimant. That cannot be said of the peripheral details in the article. Nor do the peripheral details involve an intentional disclosure in a manner which would be "highly offensive to a reasonable person of ordinary sensibilities": see [Australian Broadcasting Corp v Lenah Game Meats Pty Ltd \(2001\) 208 CLR 199](#) . The test of what is "highly offensive" is objective. Although the claimant was entitled to a private life, as a well known figure she had to expect and accept that her actions would be closely scrutinised by the media. The defendants were not in breach of the PCC Code. [Reference was made to [Attorney General v Guardian Newspapers Ltd \(No 2\) \[1990\] 1 AC 109](#) ; [Coco v A N Clark \(Engineers\) Ltd \[1969\] RPC 41](#) ; [A v B plc \[2003\] QB 195](#) and [Kaye v Robertson \[1991\] FSR 62](#) .]

In striking a balance between article 8 and article 10 the judge erred by giving primacy to the right of privacy and failing to accord the correct weight to the right to freedom of expression. The Court of Appeal was therefore right to reverse the judge's decision.

***462**

Caldecott QC in reply. The critical question arising from the PCC Code is whether the subject has a reasonable expectation of privacy: see [Kaye v Robertson \[1991\] FSR 62](#) . The articles concerned matters which were deeply private and were a disproportionately high price to pay for having lied.

Their Lordships took time for consideration. 6 May. LORD NICHOLLS OF BIRKENHEAD

1 My Lords, Naomi Campbell is a celebrated fashion model. Hers is a household name, nationally and internationally. Her face is instantly recognisable. Whatever she does and wherever she goes is news.

2 On 1 February 2001 the "Mirror" newspaper carried as its first story on its front page a prominent article headed "Naomi: I am a drug addict". The article was supported on one side by a picture of Miss Campbell as a glamorous model, on the other side by a slightly indistinct picture of a smiling, relaxed Miss Campbell, dressed in baseball cap and jeans, over the caption "Therapy: Naomi outside meeting". The article read:

"Supermodel Naomi Campbell is attending Narcotics Anonymous meetings in a courageous bid to beat her addiction to drink and drugs. The 30-year-old has been a regular at counselling sessions for three months, often attending twice a day. Dressed in jeans and baseball cap, she arrived at one of NA's lunchtime meetings this week. Hours later at a different venue she made a low-key entrance to a women-only gathering of recovered addicts. Despite her £14m fortune Naomi is treated as just another addict trying to put her life back together. A source close to her said last night: 'She wants to clean up her life for good. She went into modelling when she was very young and it is easy to be led astray. Drink and drugs are unfortunately widely available in the fashion world. But Naomi has realised she has a problem and has bravely vowed to do

something about it. Everyone wishes her well.' Her spokeswoman at Elite Models declined to comment."

3 The story continued inside, with a longer article spread across two pages. The inside article was headed "Naomi's finally trying to beat the demons that have been haunting her". The opening paragraphs read:

"She's just another face in the crowd, but the gleaming smile is unmistakably Naomi Campbell's. In our picture, the catwalk queen emerges from a gruelling two-hour session at Narcotics Anonymous and gives a friend a loving hug. This is one of the world's most beautiful women facing up to her drink and drugs addiction—and clearly winning. The London-born supermodel has been going to NA meetings for the past three months as she tries to change her wild lifestyle. Such is her commitment to conquering her problem that she regularly goes twice a day to group counselling ... To the rest of the group she is simply Naomi, the addict. Not the supermodel. Not the style icon."

4 The article made mention of Miss Campbell's efforts to rehabilitate herself, and that one of her friends said she was still fragile but "getting healthy". The article gave a general description of Narcotics Anonymous therapy, and referred to some of Miss Campbell's recent publicised ***463** activities. These included an occasion when Miss Campbell was rushed to hospital and had her stomach pumped. She claimed it was an allergic reaction to antibiotics and that she had never had a drug problem: but "those closest to her knew the truth".

5 In the middle of the double page spread, between several innocuous pictures of Miss Campbell, was a dominating picture over the caption "Hugs: Naomi, dressed in jeans and baseball hat, arrives for a lunchtime group meeting this week". The picture showed her in the street on the doorstep of a building as the central figure in a small group. She was being embraced by two people whose faces had been pixelated. Standing on the pavement was a board advertising a named café. The article did not name the venue of the meeting, but anyone who knew the district well would be able to identify the place shown in the photograph.

6 The general tone of the articles was sympathetic and supportive with, perhaps, the barest undertone of smugness that Miss Campbell had been caught out by the "Mirror". The source of the newspaper's information was either an associate of Miss Campbell or a fellow addict attending meetings of Narcotics Anonymous. The photographs of her attending a meeting were taken by a freelance photographer specifically employed by the newspaper to do the job. He took the photographs covertly, while concealed some distance away inside a parked car.

7 In certain respects the articles were inaccurate. Miss Campbell had been attending Narcotics Anonymous meetings, in this country and abroad, for two years, not three months. The frequency of her attendance at meetings was greatly exaggerated. She did not regularly attend meetings twice a day. The street photographs showed her leaving a meeting, not arriving, contrary to the caption in the newspaper article.

The proceedings and the further articles

8 On the same day as the articles were published Miss Campbell commenced proceedings against MGN Ltd, the publisher of the "Mirror". The newspaper's response was to publish further articles, this time highly critical of Miss Campbell. On 5 February 2001 the newspaper published an article headed, in large letters, "Pathetic". Below was a photograph of Miss Campbell over the caption "Help: Naomi leaves Narcotics Anonymous meeting last week after receiving therapy in her battle against illegal drugs". This photograph was similar to the street scene picture published on 1 February. The text of the article was headed "After years of self-publicity and illegal drug abuse, Naomi Campbell whinges about privacy." The article mentioned that "the Mirror revealed last week how she is attending daily meetings of Narcotics Anonymous". Elsewhere in the same edition an editorial article, with the heading "No hiding Naomi", concluded with the words: "If Naomi Campbell wants to live like a nun, let her join a nunnery. If she wants the excitement of a show business life, she must accept what comes with it."

9 Two days later, on 7 February, the "Mirror" returned to the attack with an offensive and disparaging article. Under the heading "Fame on you, Ms Campbell", an article referred to her plans "to launch a campaign for better rights for celebrities or 'artists' as she calls them". The article included ^{*464} the sentence: "As a campaigner, Naomi's about as effective as a chocolate soldier."

10 In the proceedings Miss Campbell claimed damages for breach of confidence and compensation under the Data Protection Act 1998. The article of 7 February formed the main basis of a claim for aggravated damages. Morland J [\[2002\] EWHC 499 \(QB\)](#) upheld Miss Campbell's claim. He made her a modest award of £2,500 plus £1,000 aggravated damages in respect of both claims. The newspaper appealed. The Court of Appeal, comprising Lord Phillips of Worth Matravers MR, Chadwick and Keene LJ, allowed the appeal and discharged the judge's order: [\[2003\] QB 633](#) . Miss Campbell has now appealed to your Lordships' House.

Breach of confidence: misuse of private information

11 In this country, unlike the United States of America, there is no over-arching, all-embracing cause of action for "invasion of privacy": see *Wainwright v Home Office* [2004] AC 406 . But protection of various aspects of privacy is a fast developing area of the law, here and in some other common law jurisdictions. The recent decision of the Court of Appeal of New Zealand in *Hosking v Runting* [2004] NZCA 34 is an example of this. In this country development of the law has been spurred by enactment of the Human Rights Act 1998.

12 The present case concerns one aspect of invasion of privacy: wrongful disclosure of private information. The case involves the familiar competition between freedom of expression and respect for an individual's privacy. Both are vitally important rights. Neither has precedence over the other. The importance of freedom of expression has been stressed often and eloquently, the importance of privacy less so. But it, too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual. And restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state: see *La Forest J in R v Dymont* [1988] 2 SCR 417 , 426.

13 The common law or, more precisely, courts of equity have long afforded protection to the wrongful use of private information by means of the cause of action which became known as breach of confidence. A breach of confidence was restrained as a form of unconscionable conduct, akin to a breach of trust. Today this nomenclature is misleading. The breach of confidence label harks back to the time when the cause of action was based on improper use of information disclosed by one person to another in confidence. To attract protection the information had to be of a confidential nature. But the gist of the cause of action was that information of this character had been disclosed by one person to another in circumstances "importing an obligation of confidence" even though no contract of non-disclosure existed: see the classic exposition by Megarry J in [Coco v A N Clark \(Engineers\) Ltd](#) [1969] RPC 41 , 47-48. The confidence referred to in the phrase "breach of confidence" was the confidence arising out of a confidential relationship.

14 This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so it has changed its nature. In this country this development was recognised clearly in the judgment of Lord Goff of Chieveley in [Attorney General v Guardian Newspapers Ltd \(No 2\)](#) [1990] 1 AC 109 , 281. Now the law imposes a "duty of confidence" whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Even this formulation is awkward. The continuing use of the phrase "duty of confidence" and the description of the information as "confidential" is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called "confidential". The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.

15 In the case of individuals this tort, however labelled, affords respect for one aspect of an individual's privacy. That is the value underlying this cause of action. An individual's privacy can be invaded in ways not involving publication of information. Strip searches are an example. The extent to which the common law as developed thus far in this country protects other forms of invasion of privacy is not a matter arising in the present case. It does not arise because, although pleaded more widely, Miss Campbell's common law claim was throughout presented in court exclusively on the basis of breach of confidence, that is, the wrongful *publication* by the "Mirror" of private *information* .

16 The European Convention on Human Rights, and the Strasbourg jurisprudence, have undoubtedly had a significant influence in this area of the common law for some years. The provisions of article 8 , concerning respect for private and family life, and article 10 , concerning freedom of expression, and the interaction of these two articles, have prompted the courts of this country to identify more clearly the different factors involved in cases where one or other of these two interests is present. Where both are present the courts are increasingly explicit in evaluating the competing considerations involved. When identifying and evaluating these factors the courts, including your Lordships' House, have tested the common law against the values encapsulated in these two articles. The development of the common law has been in harmony with these articles of the Convention: see, for instance, [Reynolds v Times Newspapers Ltd \[2001\] 2 AC 127](#) , 203-204.

17 The time has come to recognise that the values enshrined in articles 8 and 10 are now part of the cause of action for breach of confidence. As Lord Woolf CJ has said, the courts have been able to achieve this result by absorbing the rights protected by articles 8 and 10 into this cause of action: [A v B plc \[2003\] QB 195](#) , 202, para 4. Further, it should now be recognised that for this purpose these values are of general application. The values embodied in articles 8 and 10 are as much applicable in disputes between individuals or between an individual and a non-governmental body such as a newspaper as they are in disputes between individuals and a public authority.

18 In reaching this conclusion it is not necessary to pursue the controversial question whether the European Convention itself has this wider effect. Nor is it necessary to decide whether the duty imposed on courts by [section 6 of the Human Rights Act 1998](#) extends to questions of substantive law as distinct from questions of practice and procedure. It is sufficient to recognise that the values underlying articles 8 and 10 are not confined to disputes between individuals and public authorities. This approach has been adopted by the courts in several recent decisions, *466 reported and unreported, where individuals have complained of press intrusion. A convenient summary of these cases is to be found in Gavin Phillipson's valuable article "Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act" (2003) 66 MLR 726 , 726-728.

19 In applying this approach, and giving effect to the values protected by article 8 , courts will often be aided by adopting the structure of article 8 in the same way as they now habitually apply the Strasbourg court's approach to article 10 when resolving questions concerning freedom of expression. Articles 8 and 10 call for a more explicit analysis of competing considerations than the three traditional requirements of the cause of action for breach of confidence identified in [Coco v A N Clark \(Engineers\) Ltd \[1969\] RPC 41](#) .

20 I should take this a little further on one point. Article 8(1) recognises the need to respect private and family life. Article 8(2) recognises there are occasions when intrusion into private and family life may be justified. One of these is where the intrusion is necessary for the protection of the rights and freedoms of others. Article 10(1) recognises the importance of freedom of expression. But article 10(2), like article 8(2), recognises there are occasions when protection of the rights of others may make it necessary for freedom of expression to give way. When both these articles are engaged a difficult question of proportionality may arise. This question is distinct from the initial question of whether the published information engaged article 8 at all by being within the sphere of the complainant's private or family life.

21 Accordingly, in deciding what was the ambit of an individual's "private life" in particular circumstances courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.

22 Different forms of words, usually to much the same effect, have been suggested from time to time. The American Law Institute, Restatement of the Law, Torts, 2d (1977) , section 652D, uses the formulation of disclosure of matter which "would be highly offensive to a reasonable person". In *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 , 226, para 42, Gleeson CJ used words, widely quoted, having a similar meaning. This particular formulation should be used with care, for two reasons. First, the "highly offensive" phrase is suggestive of a stricter test of private information than a reasonable expectation of privacy. Second, the "highly offensive" formulation can all too easily bring into account, when deciding whether the disclosed information was private, considerations which go more properly to issues of proportionality; for instance, the degree of intrusion into private life, and the extent to which publication was a matter of proper public concern.

This could be a recipe for confusion.

The present case

23 I turn to the present case and consider first whether the information whose disclosure is in dispute was private. Mr Caldecott placed the information published by the newspaper into five categories: (1) the fact of **467* Miss Campbell's drug addiction; (2) the fact that she was receiving treatment; (3) the fact that she was receiving treatment at Narcotics Anonymous; (4) the details of the treatment—how long she had been attending meetings, how often she went, how she was treated within the sessions themselves, the extent of her commitment, and the nature of her entrance on the specific occasion; and (5) the visual portrayal of her leaving a specific meeting with other addicts.

24 It was common ground between the parties that in the ordinary course the information in all five categories would attract the protection of article 8. But Mr Caldecott recognised that, as he put it, Miss Campbell's "public lies" precluded her from claiming protection for categories (1) and (2). When talking to the media Miss Campbell went out of her way to say that, unlike many fashion models, she did not take drugs. By repeatedly making these assertions in public Miss Campbell could no longer have a reasonable expectation that this aspect of her life should be private. Public disclosure that, contrary to her assertions, she did in fact take drugs and had a serious drug problem for which she was being treated was not disclosure of private information. As the Court of Appeal noted, where a public figure chooses to present a false image and make untrue pronouncements about his or her life, the press will normally be entitled to put the record straight: [\[2003\] QB 633, 658](#). Thus the area of dispute at the trial concerned the other three categories of information.

25 Of these three categories I shall consider first the information in categories (3) and (4), concerning Miss Campbell's attendance at Narcotics Anonymous meetings. In this regard it is important to note this is a highly unusual case. On any view of the matter, this information related closely to the fact, which admittedly could be published, that Miss Campbell was receiving treatment for drug addiction. Thus when considering whether Miss Campbell had a reasonable expectation of privacy in respect of information relating to her attendance at Narcotics Anonymous meetings the relevant question can be framed along the following lines: Miss Campbell having put her addiction and treatment into the public domain, did the further information relating to her attendance at Narcotics Anonymous meetings retain its character of private information sufficiently to engage the protection afforded by article 8?

26 I doubt whether it did. Treatment by attendance at Narcotics Anonymous meetings is a form of therapy for drug addiction which is well known, widely used and much respected. Disclosure that Miss Campbell had opted for this form of treatment was not a disclosure of any more significance than saying that a person who has fractured a limb has his limb in plaster or that a person suffering from cancer is undergoing a course of chemotherapy. Given the extent of the information, otherwise of a highly private character, which admittedly could properly be disclosed, the additional information was of such an unremarkable and consequential nature that to divide the one from the other would be to apply altogether too fine a toothcomb. Human rights are concerned with substance, not with such fine distinctions.

27 For the same reason I doubt whether the brief details of how long Miss Campbell had been undergoing treatment, and how often she attended meetings, stand differently. The brief reference to the way she was treated at **468* the meetings did no more than spell out and apply to Miss Campbell common knowledge of how Narcotics Anonymous meetings are conducted.

28 But I would not wish to found my conclusion solely on this point. I prefer to proceed to the next stage and consider how the tension between privacy and freedom of expression should be resolved in this case, on the assumption that the information regarding Miss Campbell's attendance at Narcotics Anonymous meetings retained its private character. At this stage I consider Miss Campbell's claim must fail. I can state my reason very shortly. On the one hand, publication of this information in the unusual circumstances of this case represents, at most, an intrusion into Miss Campbell's private life to a comparatively minor degree. On the other hand, non-publication of this information would have robbed a legitimate and sympathetic newspaper story of attendant detail which added colour and conviction. This information was published in order to demonstrate Miss Campbell's commitment to tackling her drug problem. The balance ought not to be held at a point which would preclude, in this case, a degree of journalistic latitude in respect of information published for this purpose.

29 It is at this point I respectfully consider Morland J fell into error. Having held that the details of Miss Campbell's attendance at Narcotics Anonymous had the necessary quality of confidentiality, the judge seems to have put nothing into the scales under article 10 when striking the balance between articles 8 and 10. This was a misdirection. The need to be free to disseminate information regarding Miss Campbell's drug addiction is of a lower order than the need for freedom to disseminate information on some other subjects such as political information. The degree of latitude reasonably to be accorded to journalists is correspondingly reduced, but it is not excluded altogether.

30 There remains category (5): the photographs taken covertly of Miss Campbell in the road outside the building she was attending for a meeting of Narcotics Anonymous. I say at once that I wholly understand why Miss Campbell felt she was being hounded by the "Mirror". I understand also that this could be deeply distressing, even damaging, to a person whose health was still fragile. But this is not the subject of complaint. Miss Campbell, expressly, makes no complaint about the taking of the photographs. She does not assert that the taking of the photographs was itself an invasion of privacy which attracts a legal remedy. The complaint regarding the photographs is of precisely the same character as the nature of the complaints regarding the text of the articles: the information conveyed by the photographs was private information. Thus the fact that the photographs were taken surreptitiously adds nothing to the only complaint being made.

31 In general photographs of people contain more information than textual description. That is why they are more vivid. That is why they are worth a thousand words. But the pictorial information in the photographs illustrating the offending article of 1 February 2001 added nothing of an essentially private nature. They showed nothing untoward. They conveyed no private information beyond that discussed in the article. The group photograph showed Miss Campbell in the street exchanging warm greetings with others on the doorstep of a building. There was nothing undignified or distraught about her appearance. The same is true of the smaller picture on the front page. Until spotted by counsel in the course of preparing the case for *469 oral argument in your Lordships' House no one seems to have noticed that a sharp eye could just about make out the name of the café on the advertising board on the pavement.

32 For these reasons and those given by my noble and learned friend, Lord Hoffmann, I agree with the Court of Appeal that Miss Campbell's claim fails. It is not necessary for me to pursue the claim based on the Data Protection Act 1998. The parties were agreed that this claim stands or falls with the outcome of the main claim.

33 In reaching this overall conclusion I have well in mind the distress that publication of the article on 1 February 2001 must have caused Miss Campbell. Public exposure of this sort, especially for someone striving to cope with a serious medical condition, would almost inevitably be extremely painful. But it is right to recognise the source of this pain and distress. First, Miss Campbell realised she had been betrayed by an associate or fellow sufferer. Someone whom she trusted had told the newspaper she was attending Narcotics Anonymous meetings. This sense of betrayal, and consequential anxiety about continuing to attend Narcotics Anonymous meetings, flowed from her becoming aware she had been betrayed. The newspaper articles were only the *means* by which she became aware of her betrayal. Secondly, Miss Campbell realised her addiction was now public knowledge, as was the fact she was undergoing treatment. She realised also that it was now public knowledge that she had repeatedly lied. Thirdly, as already mentioned, Miss Campbell would readily feel she was being harassed by the "Mirror" employing a photographer to "spy" on her.

34 That Miss Campbell should suffer real distress under all these heads is wholly understandable. But in respect of none of these causes of distress does she have reason for complaint against the newspaper for misuse of private information. Against this background I find it difficult to envisage Miss Campbell suffered any significant additional distress based on public disclosure that her chosen form of treatment was attendance at Narcotics Anonymous meetings.

35 Nor have I overlooked the further distress caused by the subsequent mean-spirited attack, with its shabby reference to a chocolate soldier, made by the "Mirror" on a person known to be peculiarly vulnerable. If Miss Campbell had a well-founded cause of action against the newspaper the trial judge rightly recognised that an award of aggravated damages was called for. But for reasons already given I would dismiss this appeal.

LORD HOFFMANN

36 My Lords, the House is divided as to the outcome of this appeal, but the difference of opinion

relates to a very narrow point which arises on the unusual facts of this case. The facts are unusual because the plaintiff is a public figure who had made very public false statements about a matter in respect of which even a public figure would ordinarily be entitled to privacy, namely her use of drugs. It was these falsehoods which, as was conceded, made it justifiable, for a newspaper to report the fact that she was addicted. The division of opinion is whether in doing so the newspaper went too far in publishing associated facts about her private life. But the importance of this case lies in the statements of general principle on the way in which the law should strike a balance between the right to privacy and the right to freedom of expression, on which the House is unanimous. The principles are **470* expressed in varying language but speaking for myself I can see no significant differences.

37 Naomi Campbell is a famous fashion model who lives by publicity. What she has to sell is herself: her personal appearance and her personality. She employs public relations agents to present her personal life to the media in the best possible light just as she employs professionals to advise her on dress and make-up. That is no criticism of her. It is a trade like any other. But it does mean that her relationship with the media is different from that of people who expose less of their private life to the public.

38 The image which she has sought to project of herself to the international media is that of a black woman who started with few advantages in life and has by her own efforts attained international success in a glamorous profession. There is much truth in this claim. Unfortunately she has also given wide publicity, in interviews with journalists and on television, to a claim which was false, namely that (unlike many of her colleagues in the fashion business) she had not succumbed to the temptation to take drugs.

39 In January 2001 the "Mirror" obtained information that Ms Campbell had acknowledged her drug dependency by going regularly to meetings of Narcotics Anonymous ("NA") for help in ridding herself of the addiction. It was told that she would be going to a meeting at an address in the King's Road. The informant was either a member of Ms Campbell's numerous entourage or another participant in the meetings. The "Mirror" sent a photographer to sit unobtrusively in a car. As she left the meeting, he took a couple of pictures of her on the pavement.

40 On 1 February 2001 the "Mirror" published an article on the front page under the headline: "Naomi: I am a drug addict." It was accompanied by one of the pictures. The text said that she was attending NA meetings in a "courageous bid" to beat her addiction. She had been "a regular at counselling sessions for three months, often attending twice a day". It described her dress (jeans and a baseball cap) and said that later the same day she made a "low-key entrance" to a women-only gathering. A source was quoted as saying that it was easy in the fashion world to be led astray but that "Naomi has realised she has a problem and has bravely vowed to do something about it".

41 There was more on pp 12 and 13, with another picture of her in the doorway of the house where the meeting took place. The address was not identified but someone very familiar with that part of the King's Road could no doubt have recognised it. The article said that her commitment to conquering her problem was such that "she regularly goes twice a day to group counselling". The article described the way group counselling at NA worked: the anonymity which meant that to the group she was "simply Naomi, the addict. Not the supermodel." A friend was quoted as saying "She is still fragile, but she is getting healthy." Later it said that her "long rumoured problems with drugs" had emerged in public in 1997 when she was rushed to hospital, reportedly after taking an overdose, but that she had then insisted that it was an allergic reaction: "It's ridiculous. I've never had a drug problem." But, said the article "those closest to her knew the truth." There was also a good deal more about men with whom she had been associated and other past incidents, taken no doubt from a bulging cuttings file.

**471*

42 On the same day as the article appeared, Ms Campbell issued proceedings for damages for "breach of confidence and/or unlawful invasion of privacy". The narrowness of the dispute between the parties emerged at the trial when Mr Caldecott conceded that because of the publicity which Ms Campbell had given to her claim that she had "never had a drug problem" the "Mirror" was entitled to publish that she was an addict and also, in fairness to her, that she was now attempting to deal with it. The matters which were alleged to be in breach of confidence or an unlawful invasion of privacy were, first, the fact that she was attending meetings at NA, secondly, the published details of her attendance and what happened at the meetings and thirdly, the photographs taken in the street without her knowledge or consent.

43 In order to set both the concession and the residual claim in their context and to identify the point of law at issue, I must say something about the cause of action on which Ms Campbell relies. This House decided in [Wainwright v Home Office \[2004\] 2 AC 406](#) that there is no general tort of invasion of privacy. But the right to privacy is in a general sense one of the values, and sometimes the most important value, which underlies a number of more specific causes of action, both at common law and under various statutes. One of these is the equitable action for breach of confidence, which has long been recognised as capable of being used to protect privacy. Thus in the seminal case of *Prince Albert v Strange* (1849) 2 De G & Sm 652; 1 Mac & G 25 the defendant was a publisher who had obtained copies of private etchings made by the Prince Consort of members of the royal family at home. The publisher had got them from an employee of a printer to whom the Prince had entrusted the plates. Knight Bruce V-C, in granting an injunction restraining the publication of a catalogue containing descriptions of etchings, said, [2 De G & Sm 652, 698](#), that it was:

"an intrusion—an unbecoming and unseemly intrusion ... offensive to that inbred sense of propriety natural to every man—if intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life—into the home (a word hitherto sacred among us) ..."

44 But although the action for breach of confidence could be used to protect privacy in the sense of preserving the confidentiality of personal information, it was not founded on the notion that such information was in itself entitled to protection. Breach of confidence was an equitable remedy and equity traditionally fastens on the conscience of one party to enforce equitable duties which arise out of his relationship with the other. So the action did not depend upon the personal nature of the information or extent of publication but upon whether a confidential relationship existed between the person who imparted the information and the person who received it. Equity imposed an obligation of confidentiality upon the latter and (by a familiar process of extension) upon anyone who received the information with actual or constructive knowledge of the duty of confidence.

45 Thus the cause of action in *Prince Albert v Strange* was based upon the defendant's actual or constructive knowledge of the confidential relationship between the Prince Consort and the printer to whom he had entrusted the plates of his etchings. It was not essential that the information should concern the Prince's family life or be in any other way personal. Any confidential information would have done. Nor was it essential that the ^{*472} defendant should have intended widespread publication. Communication to a single unauthorised person would have been enough. Many of the cases on breach of confidence are concerned with the communication of commercially valuable information to trade rivals and not with anything that could be described as a violation of privacy.

46 In recent years, however, there have been two developments of the law of confidence, typical of the capacity of the common law to adapt itself to the needs of contemporary life. One has been an acknowledgement of the artificiality of distinguishing between confidential information obtained through the violation of a confidential relationship and similar information obtained in some other way. The second has been the acceptance, under the influence of human rights instruments such as article 8 of the European Convention, of the privacy of personal information as something worthy of protection in its own right.

47 The first development is generally associated with the speech of Lord Goff of Chieveley in [Attorney General v Guardian Newspapers Ltd \(No 2\) \[1990\] 1 AC 109](#), 281, where he gave, as illustrations of cases in which it would be illogical to insist upon violation of a confidential relationship, the "obviously confidential document ... wafted by an electric fan out of a window into a crowded street" and the "private diary ... dropped in a public place". He therefore formulated the principle as being that:

"a duty of confidence arises when confidential information comes to the knowledge of a person ... in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others."

48 This statement of principle, which omits the requirement of a prior confidential relationship, was accepted as representing current English law by the European Court of Human Rights in [Earl Spencer v United Kingdom \(1998\) 25 EHRR CD 105](#) and was applied by the Court of Appeal in [A v B plc \[2003\] QB 195](#), 207. It is now firmly established.

49 The second development has been rather more subtle. Until the Human Rights Act 1998 came into force, there was no equivalent in English domestic law of article 8 of the European Convention or the equivalent articles in other international human rights instruments which guarantee rights of privacy. So the courts of the United Kingdom did not have to decide what such guarantees meant. Even now that the equivalent of article 8 has been enacted as part of English law, it is not directly concerned with the protection of privacy against private persons or corporations. It is, by virtue of [section 6 of the 1998 Act](#), a guarantee of privacy only against public authorities. Although the Convention, as an international instrument, may impose upon the United Kingdom an obligation to take some steps (whether by statute or otherwise) to protect rights of privacy against invasion by private individuals, it does not follow that such an obligation would have any counterpart in domestic law.

50 What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity. And this recognition has raised inescapably the question of why it should be worth protecting against the state but not against a private person. There may of course be justifications for the publication of private information by ***473** private persons which would not be available to the state—I have particularly in mind the position of the media, to which I shall return in a moment—but I can see no logical ground for saying that a person should have less protection against a private individual than he would have against the state for the publication of personal information for which there is no justification. Nor, it appears, have any of the other judges who have considered the matter.

51 The result of these developments has been a shift in the centre of gravity of the action for breach of confidence when it is used as a remedy for the unjustified publication of personal information. It recognises that the incremental changes to which I have referred do not merely extend the duties arising traditionally from a relationship of trust and confidence to a wider range of people. As Sedley LJ observed in a perceptive passage in his judgment in [Douglas v Hello! Ltd \[2001\] QB 967](#), 1001, the new approach takes a different view of the underlying value which the law protects. Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity—the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.

52 These changes have implications for the future development of the law. They must influence the approach of the courts to the kind of information which is regarded as entitled to protection, the extent and form of publication which attracts a remedy and the circumstances in which publication can be justified.

53 In this case, however, it is unnecessary to consider these implications because the cause of action fits squarely within both the old and the new law. The judge found that the information about Ms Campbell's attendance at NA had been communicated to the "Mirror" in breach of confidence and that the "Mirror" must have known that the information was confidential. As for human autonomy and dignity, I should have thought that the extent to which information about one's state of health, including drug dependency, should be communicated to other people was plainly something which an individual was entitled to decide for herself: compare [Z v Finland \(1997\) 25 EHRR 371](#), 405, at para 95. The whole point of NA is that participants in its meetings are anonymous. It offers them support and the possibility of recovery without requiring them to allow information about their drug dependency to become more widely known. If Ms Campbell had been an ordinary citizen, I think that the publication of information about her attendance at NA would have been actionable and I do not understand the "Mirror" to argue otherwise.

54 What is said to make this case different is, first, that Ms Campbell is a public figure who has sought publicity about various aspects of her private life and secondly, that the aspects of her private life which she has publicised include her use of drugs, in respect of which she has made a false claim. The "Mirror" claims that on these grounds it was entitled in the public interest to publish the information and photographs and that its right to do so is protected by article 10 of the European Convention.

55 I shall first consider the relationship between the freedom of the press and the common law right of the individual to protect personal information. Both reflect important civilised values, but, as often happens, ***474** neither can be given effect in full measure without restricting the other. How are they to be reconciled in a particular case? There is in my view no question of automatic priority. Nor is there a presumption in favour of one rather than the other. The question is rather the extent to which it

is *necessary* to qualify the one right in order to protect the underlying value which is protected by the other. And the extent of the qualification must be proportionate to the need: see Sedley LJ in [Douglas v Hello! Ltd \[2001\] QB 967](#), 1005, para 137.

56 If one takes this approach, there is often no real conflict. Take the example I have just given of the ordinary citizen whose attendance at NA is publicised in his local newspaper. The violation of the citizen's autonomy, dignity and self-esteem is plain and obvious. Do the civil and political values which underlie press freedom make it necessary to deny the citizen the right to protect such personal information? Not at all. While there is no contrary public interest recognised and protected by the law, the press is free to publish anything it likes. Subject to the law of defamation, it does not matter how trivial, spiteful or offensive the publication may be. But when press freedom comes into conflict with another interest protected by the law, the question is whether there is a sufficient public interest in that particular publication to justify curtailment of the conflicting right. In the example I have given, there is no public interest whatever in publishing to the world the fact that the citizen has a drug dependency. The freedom to make such a statement weighs little in the balance against the privacy of personal information.

57 One must therefore proceed to consider the grounds why the "Mirror" say there was a public interest in its publication of information about Ms Campbell which it would not have been justified in publishing about someone else. First, there is the fact that she is a public figure who has had a long and symbiotic relationship with the media. In my opinion, that would not in itself justify publication. A person may attract or even seek publicity about some aspects of his or her life without creating any public interest in the publication of personal information about other matters. I think that the history of Ms Campbell's relationship with the media does have some relevance to this case, to which I shall return in due course, but that would not without more justify publication of confidential personal information.

58 The reason why Mr Caldecott concedes that the "Mirror" was entitled to publish the fact of her drug dependency and the fact that she was seeking treatment is that she had specifically given publicity to the very question of whether she took drugs and had falsely said that she did not. I accept that this creates a sufficient public interest in the correction of the impression she had previously given.

59 The question is then whether the "Mirror" should have confined itself to these bare facts or whether it was entitled to reveal more of the circumstantial detail and print the photographs. If one applies the test of necessity or proportionality which I have suggested, this is a matter on which different people may have different views. That appears clearly enough from the judgments which have been delivered in this case. But judges are not newspaper editors. It may have been possible for the "Mirror" to satisfy the public interest in publication with a story which contained less detail and omitted the photographs. But the "Mirror" said that they wanted to show **475* themselves sympathetic to Ms Campbell's efforts to overcome her dependency. For this purpose, some details about her frequency of attendance at NA meetings were needed. I agree with the observation of the Court of Appeal [\[2003\] QB 633](#), 660, para 52, that it is harsh to criticise the editor for "painting a somewhat fuller picture in order to show her in a sympathetic light".

60 To someone who started with the (legitimately communicated) knowledge that she was seeking treatment, there was nothing special about the additional details. The fact that she was going to NA would come as no surprise; there are, according to its website, 31,000 NA meetings a week in 100 different countries. The anonymity of participants and the general nature of the therapy is common knowledge. The details of her frequency of attendance (which were in fact inaccurate) could not be said to be discreditable or embarrassing. The relatively anodyne nature of the additional details is in my opinion important and distinguishes this case from cases in which (for example) there is a public interest in the disclosure of the existence of a sexual relationship (say, between a politician and someone whom she has appointed to public office) but the addition of salacious details or intimate photographs is disproportionate and unacceptable. The latter, even if accompanying a legitimate disclosure of the sexual relationship, would be too intrusive and demeaning.

61 That brings me to what seems to be the only point of principle which arises in this case. Where the main substance of the story is conceded to have been justified, should the newspaper be held liable whenever the judge considers that it was not necessary to have published some of the personal information? Or should the newspaper be allowed some margin of choice in the way it chooses to present the story?

62 In my opinion, it would be inconsistent with the approach which has been taken by the courts in a

number of recent landmark cases for a newspaper to be held strictly liable for exceeding what a judge considers to have been necessary. The practical exigencies of journalism demand that some latitude must be given. Editorial decisions have to be made quickly and with less information than is available to a court which afterwards reviews the matter at leisure. And if any margin is to be allowed, it seems to me strange to hold the "Mirror" liable in damages for a decision which three experienced judges in the Court of Appeal have held to be perfectly justified.

63 Ms Campbell now concedes the truth of the essentials of the "Mirror's" story but the editor said in evidence that he thought at the time, in view of her previous falsehoods, that it was necessary to include some detail and photographs by way of verification. It is unreasonable to expect that in matters of judgment any more than accuracy of reporting, newspapers will always get it absolutely right. To require them to do so would tend to inhibit the publication of facts which should in the public interest be made known. That was the basis of the decision of this House in [Reynolds v Times Newspapers Ltd \[2001\] 2 AC 127](#) and I think that it is equally applicable to the publication of private personal information in the cases in which the essential part of that information can legitimately be published.

64 A similar point, in relation to the protection of private information, was made by the European Court of Human Rights in *Fressoz and Roire v France* (1999) 31 EHRR 28. "Le Canard enchaîné" published the salary *476 of Mr Calvet, the chairman of Peugeot (which was publicly available information), and also, by way of confirmation, photographs of the relevant part of his tax assessment, which was confidential and could not lawfully be published. The Strasbourg court said, at p 60, that the conviction of the journalists for publishing the assessment infringed their right of free speech under article 10 :

"If, as the Government accepted, the information about Mr Calvet's annual income was lawful and its disclosure permitted, the applicants' conviction merely for having published the documents in which the information was contained, namely the tax assessments, cannot be justified under article 10. In essence, that article leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility."

65 In my opinion the Court of Appeal was right in the present case to say [\[2003\] QB 633, 662](#), para 64:

"Provided that publication of particular confidential information is justifiable in the public interest, the journalist must be given reasonable latitude as to the manner in which that information is conveyed to the public or his article 10 right to freedom of expression will be unnecessarily inhibited."

66 It is only in connection with the degree of latitude which must be allowed to the press in the way it chooses to present its story that I think it is relevant to consider Ms Campbell's relationship with the media. She and they have for many years both fed upon each other. She has given them stories to sell their papers and they have given her publicity to promote her career. This does not deprive Ms Campbell of the right to privacy in respect of areas of her life which she has not chosen to make public. But I think it means that when a newspaper publishes what is in substance a legitimate story, she cannot insist upon too great a nicety of judgment in the circumstantial detail with which the story is presented.

67 The trial judge described, at para 35, the "essential question" as being:

"whether even if a public figure which includes an international celebrity, such as Miss Naomi Campbell, courts and expects media exposure, she is left with a residual area of privacy which the court should protect if its revelation would amount to a breach of confidentiality."

68 To that question I would certainly answer yes, but it was not the question which arose in this case. Accepting that Ms Campbell has a "residual area of privacy", the question is whether it was infringed by the publication in this case. To answer that question one must assess the disclosures said to be

objectionable in the light of the disclosures conceded to be legitimate. One must then ask whether the journalists exceeded the latitude which should be allowed to them in presenting their story.

69 The judge made no attempt to answer either of these questions. He said:

"In my judgment clearly the publication of information about details of her therapy in regularly attending meetings of [NA] was to Miss Naomi *477 Campbell's detriment. It was, viewed objectively, likely to affect adversely her attendance and participation in therapy meetings."

70 The judge did not analyse the details which were said to be likely to have this effect or explain why they should have this effect when the bare revelation that she was a drug addict seeking therapy would not. The question of the effect of the publication upon Ms Campbell's therapy was not pleaded. She is resident in the United States but travels widely and often visits London. In her witness statement she said that since the article she had not been back to that particular meeting place but had attended a few meetings in England and continued to attend NA meetings in other countries. The question was not further explored. Nor did the judge consider whether, even assuming that the article had included unnecessary details, it was within the margin of judgment which the newspaper should be allowed. In my opinion it was and the judge's failure to take this into account was an error of principle which the Court of Appeal was right to correct.

71 As for the Court of Appeal's own approach, I do not understand the submission that it erred in saying, at p 659, para 48, that it did not equate "the information that Miss Campbell was receiving therapy from [NA] ... with disclosure of clinical details of medical treatment". I do not imagine that the Court of Appeal was unaware of the nature of the therapy provided by NA or was attempting some obscure metaphysical distinction. It was saying only that the support provided by NA for large numbers of drug addicts is so well known that it cannot be compared with the details of individual clinical treatment. This seems to me no more than common sense.

72 That leaves the question of the photographs. In my opinion a photograph is in principle information no different from any other information. It may be a more vivid form of information than the written word ("a picture is worth a thousand words"). That has to be taken into account in deciding whether its publication infringes the right to privacy of personal information. The publication of a photograph cannot necessarily be justified by saying that one would be entitled to publish a verbal description of the scene: see [Douglas v Hello! Ltd \[2001\] QB 967](#). But the principles by which one decides whether or not the publication of a photograph is an unjustified invasion of the privacy of personal information are in my opinion the same as those which I have already discussed.

73 In the present case, the pictures were taken without Ms Campbell's consent. That in my opinion is not enough to amount to a wrongful invasion of privacy. The famous and even the not so famous who go out in public must accept that they may be photographed without their consent, just as they may be observed by others without their consent. As Gleeson CJ said in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 226, para 41: "Part of the price we pay for living in an organised society is that we are exposed to observation in a variety of ways by other people."

74 But the fact that we cannot avoid being photographed does not mean that anyone who takes or obtains such photographs can publish them to the world at large. In the recent case of *Peck v United Kingdom* (2003) 36 EHRR 719 Mr Peck was filmed on a public street in an embarrassing moment by a CCTV camera. Subsequently, the film was broadcast several *478 times on the television. The Strasbourg court said, at p 739, that this was an invasion of his privacy contrary to article 8: "the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation and to a degree surpassing that which the applicant could possibly have foreseen when he walked in Brentwood on 20 August 1995."

75 In my opinion, therefore, the widespread publication of a photograph of someone which reveals him to be in a situation of humiliation or severe embarrassment, even if taken in a public place, may be an infringement of the privacy of his personal information. Likewise, the publication of a photograph taken by intrusion into a private place (for example, by a long distance lens) may in itself by such an infringement, even if there is nothing embarrassing about the picture itself: [Hellewell v Chief Constable of Derbyshire \[1995\] 1 WLR 804](#), 807. As Lord Mustill said in [R v Broadcasting Standards Commission, Ex p British Broadcasting Corp \[2001\] QB 885](#), 900, "An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the

demonstration that the personal space is not inviolate."

76 In the present case, however, there was nothing embarrassing about the picture, which showed Ms Campbell neatly dressed and smiling among a number of other people. Nor did the taking of the picture involve an intrusion into private space. Hundreds of such "candid" pictures of Ms Campbell, taken perhaps on more glamorous occasions, must have been published in the past without objection. The only ground for claiming that the picture was a wrongful disclosure of personal information was by virtue of the caption, which said that she was going to or coming from a meeting of NA. But this in my opinion added nothing to what was said in the text.

77 No doubt it would have been possible for the "Mirror" to have published the article without pictures. But that would in my opinion again be to ignore the realities of this kind of journalism as much as to expect precision of judgment about the amount of circumstantial detail to be included in the text. We value the freedom of the press but the press is a commercial enterprise and can flourish only by selling newspapers. From a journalistic point of view, photographs are an essential part of the story. The picture carried the message, more strongly than anything in the text alone, that the *Mirror's* story was true. So the decision to publish the pictures was in my opinion within the margin of editorial judgment and something for which appropriate latitude should be allowed.

78 I would therefore dismiss the appeal.

LORD HOPE OF CRAIGHEAD

79 My Lords, the facts of this case have been described by my noble and learned friend, Lord Nicholls of Birkenhead, and I gratefully adopt his account of them. But I should like to say a few more words about the general background before I explain why I have reached the conclusion that this appeal must be allowed.

The background

80 The business of fashion modelling, in which the appellant, Naomi Campbell, has built up such a powerful reputation internationally, is ^{*479} conducted under the constant gaze of the media. It is also highly competitive. It is a context where public reputation as a forceful and colourful personality adds value to the physical appearance of the individual. Much good can come of this, if the process is carefully and correctly handled. But there are aspects of Miss Campbell's exploitation of her status as a celebrity that have attracted criticism. She has been manipulative and selective in what she has revealed about herself. She has engaged in a deliberately false presentation of herself as someone who, in contrast to many models, has managed to keep clear of illegal drugs. The true position, it is now agreed, is that she has made a practice of abusing drugs. This has caused her medical problems, and it has affected her behaviour to such an extent that she has required and has received therapy for her addiction.

81 Paradoxically, for someone in Miss Campbell's position, there are few areas of the life of an individual that are more in need of protection on the grounds of privacy than the combating of addiction to drugs or to alcohol. It is hard to break the habit which has led to the addiction. It is all too easy to give up the struggle if efforts to do so are exposed to public scrutiny. The struggle, after all, is an intensely personal one. It involves a high degree of commitment and of self-criticism. The sense of shame that comes with it is one of the most powerful of all the tools that are used to break the habit. But shame increases the individual's vulnerability as the barriers that the habit has engendered are broken down. The smallest hint that the process is being watched by the public may be enough to persuade the individual to delay or curtail the treatment. At the least it is likely to cause distress, even to those who in other circumstances like to court publicity and regard publicity as a benefit.

82 The question in this case is whether the publicity which the respondents gave to Miss Campbell's drug addiction and to the therapy which she was receiving for it in an article which was published in the "Mirror" newspaper on 1 February 2001 is actionable on the ground of breach of confidence. Miss Campbell cannot complain about the fact that publicity was given in this article to the fact that she was a drug addict. This was a matter of legitimate public comment, as she had not only lied about her addiction but had sought to benefit from this by comparing herself with others in the fashion business who were addicted. As the Court of Appeal observed [\[2003\] QB 633, 658](#), para 43, where a public figure chooses to make untrue pronouncements about his or her private life, the press will normally be entitled to put the record straight.

83 Miss Campbell's case is that information about the details of the treatment which she was receiving for the addiction falls to be treated differently. This is because it was not the subject of any falsehood that was in need of correction and because it was information which any reasonable person who came into possession of it would realise was obtained in confidence. The argument was put succinctly in the particulars of her claim, where it was stated:

"Information about whether a person is receiving medical or similar treatment for addiction, and in particular details relating to such treatment or the person's reaction to it, is obviously confidential. The confidentiality is the stronger where, as here, disclosure would tend to *480 disrupt the treatment and/or its benefits for the person concerned and others sharing in, or giving, or wishing to take or participate in, the treatment. The very name 'Narcotics Anonymous' underlines the importance of privacy in the context of treatment as do the defendants' own words—'To the rest of the group she is simply Naomi, the addict.' "

84 The respondents' answer is based on the proposition that the information that was published about her treatment was peripheral and not sufficiently significant to amount to a breach of the duty of confidence that was owed to her. They also maintain that the right balance was struck between Miss Campbell's right to respect for her private life under article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) and the right to freedom of expression that is enshrined in article 10(1) of the Convention.

85 The questions that I have just described seem to me to be essentially questions of fact and degree and not to raise any new issues of principle. As Lord Woolf CJ said in [A v B plc \[2003\] QB 195](#), 207, paras 11(ix) and (x), the need for the existence of a confidential relationship should not give rise to problems as to the law because a duty of confidence will arise whenever the party subject to the duty is in a situation where he knows or ought to know that the other person can reasonably expect his privacy to be protected. The difficulty will be as to the relevant facts, bearing in mind that, if there is an intrusion in a situation where a person can reasonably expect his privacy to be respected, that intrusion will be capable of giving rise to liability unless the intrusion can be justified: see also the exposition in [Attorney General v Guardian Newspapers Ltd \(No 2\) \[1990\] 1 AC 109](#), 282 by Lord Goff of Chieveley, where he set out the three limiting principles to the broad general principle that a duty of confidence arises when confidential information comes to the knowledge of a person where he has notice that the information is confidential. The third limiting principle is particularly relevant in this case. This is the principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.

86 The language has changed following the coming into operation of the Human Rights Act 1998 and the incorporation into domestic law of article 8 and article 10 of the Convention. We now talk about the right to respect for private life and the countervailing right to freedom of expression. The jurisprudence of the European Court offers important guidance as to how these competing rights ought to be approached and analysed. I doubt whether the result is that the centre of gravity, as my noble and learned friend, Lord Hoffmann, says, has shifted. It seems to me that the balancing exercise to which that guidance is directed is essentially the same exercise, although it is plainly now more carefully focussed and more penetrating. As Lord Woolf CJ said in [A v B plc \[2003\] QB 195](#), 202, para 4, new breadth and strength is given to the action for breach of confidence by these articles.

87 Where a case has gone to trial it would normally be right to attach a great deal of weight to the views which the judge has formed about the facts and where he thought the balance should be struck after reading and hearing the evidence. The fact that the Court of Appeal felt able to differ from the conclusions which Morland J reached on these issues brings me to the first point on which I wish to comment. *481

Was the information confidential?

88 The information contained in the article consisted of the following five elements: (1) the fact that Miss Campbell was a drug addict; (2) the fact that she was receiving treatment for her addiction; (3) the fact that the treatment which she was receiving was provided by Narcotics Anonymous; (4) details of the treatment—for how long, how frequently and at what times of day she had been receiving it, the

nature of it and extent of her commitment to the process; and (5) a visual portrayal by means of photographs of her when she was leaving the place where treatment had been taking place.

89 The trial judge drew the line between the first two and the last three elements. Mr Caldecott for Miss Campbell said that he was content with this distinction. So the fact that she was a drug addict was open to public comment in view of her denials, although he maintained that this would normally be treated as a medical condition that was entitled to protection. He accepted that the fact that she was receiving treatment for the condition was not in itself intrusive in this context. Moreover disclosure of this fact in itself could not harm her therapy. But he said that the line was crossed as soon as details of the nature and frequency of the treatment were given, especially when these details were accompanied by a covertly taken photograph which showed her leaving one of the places where she had been undertaking it. This was an area of privacy where she was entitled to be protected by an obligation of confidence.

90 Court of Appeal recognised at the start of their discussion of this point that some categories of information are well recognised as confidential: [\[2003\] QB 633, 659](#), para 47. They noted that these include details of a medical condition or its treatment. But they were not prepared to accept that information that Miss Campbell was receiving therapy from Narcotics Anonymous was to be equated with disclosure of clinical details of the treatment of a medical condition: para 48. This was contrary to the view which Morland J appears to have taken when he said, at para 40, that it mattered not whether therapy was obtained by means of professional medical input or by alternative means such as group counselling or by organised meetings between sufferers. The Court of Appeal were also of the view that the publication of this information was not, in its context, sufficiently significant to shock the conscience and thus to amount to a breach of the duty of confidence which was owed to her. They accepted the respondents' argument that disclosure of these details was peripheral. They had regard too to the fact that some of the additional information that was given in the article was inaccurate.

91 I do not think that the Court of Appeal were right to reject the analogy which the judge drew between information that Miss Campbell was receiving therapy from Narcotics Anonymous and information about details of a medical condition or its treatment. Mr Brown for the respondents said that it was not his case that there was an essential difference or, as he put it, a bright line distinction between therapy and medical treatment. He maintained that the Court of Appeal were simply drawing attention to a difference of degree. But it seems to me that there is more in this passage in the Court of Appeal's judgment and its criticism of the judge's analogy than a difference of degree. The implication of the Court of Appeal's criticism of ^{*482} the judge's reasoning is that the details of non-medical therapy are less deserving of protection than the details of a medical condition or its treatment. That seems to be why, as they put it, in para 48, the two "are not to be equated."

92 The underlying question in all cases where it is alleged that there has been a breach of the duty of confidence is whether the information that was disclosed was private and not public. There must be some interest of a private nature that the claimant wishes to protect: [A v B plc \[2003\] QB 195](#), 206, para 11(vii). In some cases, as the Court of Appeal said in that case, the answer to the question whether the information is public or private will be obvious. Where it is not, the broad test is whether disclosure of the information about the individual ("A") would give substantial offence to A, assuming that A was placed in similar circumstances and was a person of ordinary sensibilities.

93 The trial judge applied the test which was suggested by Gleeson CJ in *Australian Broadcasting Corpn v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199. In that case the respondent sought an interlocutory injunction against the broadcasting of a film about its operations at a bush tail possum processing facility. It showed the stunning and killing of possums. Gleeson CJ said, at p 204, paras 34-35, that information about the respondent's slaughtering methods was not confidential in its nature and that, while the activities filmed were carried out on private property, they were not shown, or alleged, to be private in any other sense. He observed, at p 226, para 42, that there was a large area in between what was necessarily public and what was necessarily private:

"An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of

activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private."

Applying to the facts of the case the test which he had described in the last sentence of this paragraph, he said in para 43 that the problem for the respondent was that the activities secretly observed and filmed were not relevantly private.

94 The test which Gleeson CJ has identified is useful in cases where there is room for doubt, especially where the information relates to an activity or course of conduct such as the slaughtering methods that were in issue in that case. But it is important not to lose sight of the remarks which preceded it. The test is not needed where the information can easily be identified as private. It is also important to bear in mind its source, and the guidance which the source offers as to whether the information is public or private. It is taken from the definition of the privacy tort in the United ^{*483} States, where the right of privacy is invaded if the matter which is publicised is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public: American Law Institute, Restatement of the Law, Torts, 2d (1977) , section 625D. The reference to a person of ordinary sensibilities is, as Gleeson CJ acknowledged in his footnote on p 226, a quotation from William L Prosser, "Privacy" (1960) 48 California Law Review 383. As Dean Prosser put it, at pp 396-397, the matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities, who must expect some reporting of his daily activities. The law of privacy is not intended for the protection of the unduly sensitive.

95 I think that the judge was right to regard the details of Miss Campbell's attendance at Narcotics Anonymous as private information which imported a duty of confidence. He said that information relating to Miss Campbell's therapy for drug addiction giving details that it was by regular attendance at Narcotics Anonymous meetings was easily identifiable as private. With reference to the guidance that the Court of Appeal gave in A v B plc [2003] QB 195 , 206, para 11(vii), he said that it was obvious that there existed a private interest in this fact that was worthy of protection. The Court of Appeal, on the other hand, seem to have regarded the receipt of therapy from Narcotics Anonymous as less worthy of protection in comparison with treatment for the condition administered by medical practitioners. I would not make that distinction. Views may differ as to what is the best treatment for an addiction. But it is well known that persons who are addicted to the taking of illegal drugs or to alcohol can benefit from meetings at which they discuss and face up to their addiction. The private nature of these meetings encourages addicts to attend them in the belief that they can do so anonymously. The assurance of privacy is an essential part of the exercise. The therapy is at risk of being damaged if the duty of confidence which the participants owe to each other is breached by making details of the therapy, such as where, when and how often it is being undertaken, public. I would hold that these details are obviously private.

96 If the information is obviously private, the situation will be one where the person to whom it relates can reasonably expect his privacy to be respected. So there is normally no need to go on and ask whether it would be highly offensive for it to be published. The trial judge nevertheless asked himself, as a check, whether the information that was disclosed about Miss Campbell's attendance at these meetings satisfied Gleeson CJ's test of confidentiality. His conclusion, echoing the words of Gleeson CJ, was that disclosure that her therapy for drug addiction was by regular attendance at meetings of Narcotics Anonymous would be highly offensive to a reasonable person of ordinary sensibilities. The Court of Appeal disagreed with this assessment. In para 53 they said that, given that it was legitimate for the respondents to publish the fact that Miss Campbell was a drug addict and that she was receiving treatment, it was not particularly significant to add the fact that the treatment consisted of attendance at meetings of Narcotics Anonymous. In para 54 they said that they did not consider that a reasonable person of ordinary sensibilities, on reading that Miss Campbell was a drug addict, would have found it highly offensive, or even offensive. They acknowledged that the reader might have found it offensive that what were obviously covert photographs had been taken of her, but that this of ^{*484} itself was not relied upon as a ground for legal complaint. Having drawn these conclusions they held, in para 58, that the publication of the information of which Miss Campbell complains was not, in its context, sufficiently significant to amount to a breach of duty of confidence owed to her.

97 This part of the Court of Appeal's examination of the issue appears to have been influenced by the fact that they did not regard disclosure of the fact that Miss Campbell was receiving therapy from

Narcotics Anonymous capable of being equated with treatment of a clinical nature. If one starts from the position that a course of therapy which takes this form is of a lower order, it is relatively easy to conclude that a reasonable person of ordinary sensibilities would not regard the publication of the further details of her therapy as particularly significant. But I think that it is unrealistic to look through the eyes of a reasonable person of ordinary sensibilities at the degree of confidentiality that is to be attached to a therapy for drug addiction without relating this objective test to the particular circumstances.

98 Where the person is suffering from a condition that is in need of treatment one has to try, in order to assess whether the disclosure would be objectionable, to put oneself into the shoes of a reasonable person who is in need of that treatment. Otherwise the exercise is divorced from its context. The fact that no objection could be taken to disclosure of the first two elements in the article does not mean that they must be left out of account in a consideration as to whether disclosure of the other elements was objectionable. The article must be read as a whole along with the photographs to give a proper perspective to each element. The context was that of a drug addict who was receiving treatment. It is her sensibilities that needed to be taken into account. Critical to this exercise was an assessment of whether disclosure of the details would be liable to disrupt her treatment. It does not require much imagination to appreciate the sense of unease that disclosure of these details would be liable to engender, especially when they were accompanied by a covertly taken photograph. The message that it conveyed was that somebody, somewhere, was following her, was well aware of what was going on and was prepared to disclose the facts to the media. I would expect a drug addict who was trying to benefit from meetings to discuss her problem anonymously with other addicts to find this distressing and highly offensive.

99 The approach which the Court of Appeal took to this issue seems to me, with great respect, to be quite unreal. I do not think that they had a sound basis for differing from the conclusion reached by the trial judge as to whether the information was private. They were also in error, in my opinion, when they were asking themselves whether the disclosure would have offended the reasonable man of ordinary susceptibilities. The mind that they examined was the mind of the reader: para 54. This is wrong. It greatly reduces the level of protection that is afforded to the right of privacy. The mind that has to be examined is that, not of the reader in general, but of the person who is affected by the publicity. The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity.

100 In *P v D* [2000] 2 NZLR 591 the claimant was a public figure who was told that publicity was about to be given to that fact that he had been treated at a psychiatric hospital. In my opinion the objective test was *485 correctly described and applied by Nicholson J, at p 601, para 39, when he said:

"The factor that the matter must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities prescribes an objective test. But this is on the basis of what a reasonable person of ordinary sensibilities would feel if they were in the same position, that is, in the context of the particular circumstances. I accept that P has the stated feelings and consider that a reasonable person of ordinary sensibilities would in the circumstances also find publication of information that they had been a patient in a psychiatric hospital highly offensive and objectionable."

That this is the correct approach is confirmed by the *Restatement*, p 387, which states at the end of its comment on clause (a) of section 652D: "It is only when the publicity given to him is such that a reasonable person would feel justified in feeling seriously aggrieved by it, that the cause of action arises." (Emphasis added.)

101 These errors have an important bearing on the question whether the Court of Appeal were right to differ from the decision of the trial judge on the question where the balance lay between the private interest of Miss Campbell and the public interest in the publication of these details.

102 In view of the conclusion that I have reached on this issue it is not necessary for me to say anything about the weight that the Court of Appeal attached to the inaccuracies, except to observe that there is a vital difference between inaccuracies that deprive the information of its intrusive quality and inaccuracies that do not. The inaccuracies that were relied on here fall into the latter category. The length of time that Miss Campbell had been attending meetings was understated, while the

frequency of her attendance at meetings was exaggerated. And the caption to the photograph in the first article stated that she was arriving at the meeting, when the fact was that she was leaving it. These were errors of a minor nature only, which did not affect the overall significance of the details that were published. I would hold that they did not detract from the private nature of what was being published.

The competing rights of free speech and privacy

103 Morland J did not give any detailed reasons in para 70 of his judgment for his conclusion that, striking the balance between articles 8 and 10 and having full regard to [section 12\(4\) of the Human Rights Act 1998](#), Miss Campbell was entitled to the remedy of damages. But he did recognise in para 98 that neither article 10 nor article 8 had pre-eminence, the one over the other. Court of Appeal's approach to the respondents' entitlement to publish what they described as the peripheral details was based on their view that the provision of these details as background to support the story that Miss Campbell was a drug addict was a legitimate part of the journalistic package which was designed to demonstrate that she had been deceiving the public when she said that she did not take drugs: [\[2003\] QB 633, 662](#), para 62. In para 64 they said that its publication was justified in order to give a factual account that had the detail necessary to carry credibility. But they do not appear to have attempted to balance the competing Convention [*486](#) rights against each other. No doubt this was because they had already concluded that these details were peripheral and that their publication was not, in its context, sufficiently significant to amount to a breach of duty of confidence: para 58.

104 In my opinion the Court of Appeal's approach is open to the criticism that, because they wrongly held that these details were not entitled to protection under the law of confidence, they failed to carry out the required balancing exercise.

105 The context for this exercise is provided by articles 8 and 10 of the Convention. The rights guaranteed by these articles are qualified rights. Article 8(1) protects the right to respect for private life, but recognition is given in article 8(2) to the protection of the rights and freedoms of others. Article 10(1) protects the right to freedom of expression, but article 10(2) recognises the need to protect the rights and freedoms of others. The effect of these provisions is that the right to privacy which lies at the heart of an action for breach of confidence has to be balanced against the right of the media to impart information to the public. And the right of the media to impart information to the public has to be balanced in its turn against the respect that must be given to private life.

106 There is nothing new about this, as the need for this kind of balancing exercise was already part of English law: [Attorney General v Guardian Newspapers Ltd \(No 2\) \[1990\] 1 AC 109, per Lord Goff of Chieveley](#). But account must now be taken of the guidance which has been given by the European court on the application of these articles. As Sedley LJ pointed out in [Douglas v Hello! Ltd \[2001\] QB 967](#), 1004, para 135:

"The European Court of Human Rights has always recognised the high importance of free media of communication in a democracy, but its jurisprudence does not—and could not consistently with the Convention itself—give article 10(1) the presumptive priority which is given, for example, to the First Amendment in the jurisprudence of the United States' courts. Everything will ultimately depend on the proper balance between privacy and publicity in the situation facing the court."

107 I accept, of course, that the importance which the Court of Appeal attached to the journalistic package finds support in the authorities. In [Jersild v Denmark \(1994\) 19 EHRR 1](#), para 31 the European court, repeating what was said in [Observer and Guardian v United Kingdom \(1991\) 14 EHRR 153](#), para 59, declared that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. It then added these comments in para 31:

"Whilst the press must not overstep the bounds set, inter alia, in the interest of 'the protection of the reputation and rights of others', it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'."

*487

108 The freedom of the press to exercise its own judgment in the presentation of journalistic material was emphasised in a further passage in Jersild's case where the court said, at p 26, para 31:

"At the same time, the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. In this context the court recalls that article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed."

In *Fressoz and Roire v France* (1999) 31 EHRR 28, 60, para 54 the court said that in essence article 10 leaves it for journalists to decide whether or not it is necessary to reproduce material to ensure credibility, adding:

"It protects journalists' rights to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism."

109 There was no need for the court in Jersild's case to examine the question how the article 10 right which was relied on was to be balanced against a competing right under article 8 of the Convention. The applicants maintained that their right to freedom of expression under article 10 was infringed when they were charged and convicted of committing offences which resulted from their choice of the material that had been published. The objectionable remarks which were contained in the television broadcast of a news programme were of a racist nature. The focus of the case was on the right to impart information and ideas of public interest and the right of the public to receive such ideas. The *Fressoz* case on the other hand was about the disclosure of information which was confidential as it was contained in the taxpayer's tax file. It was lawful to disclose information about the taxpayer's income. The question was whether publication of the documents in which that information was contained could be justified under article 10. So the court addressed itself to the question whether the objective of preserving fiscal confidentiality, which in itself was legitimate, constituted a relevant and sufficient justification for the interference with the article 10 right. There was a balance to be struck by weighing the interference with freedom to disclose against the need for confidentiality.

110 The need for a balancing exercise to be carried out is also inherent in the provisions of article 10 itself, as the court explained in *Bladet Tromsø and Stensaas v Norway* (1999) 29 EHRR 125. In that case a newspaper and its editor complained that their right to freedom of expression had been breached when they were found liable in defamation proceedings for statements in articles which they had published about the methods used by seal hunters in the hunting of harp seals. At p 167, para 59 the court said:

"Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart— *488 in a manner consistent with its obligations and responsibilities—information and ideas on all matters of public interest."

The court dealt with the question of balance, at p 169, para 65:

"Article 10 of the Convention does not, however, guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of the article the exercise of this freedom carries with it 'duties and responsibilities' which also apply to the press. These 'duties and responsibilities' are liable to assume significance when, as in the present case, there is question of attacking the reputation of private individuals and examining the 'rights of others'. As pointed out by the government, the seal hunters' right to protection of their honour and reputation is itself internationally recognised under article 17 of the International Covenant on Civil and Political Rights. Also of relevance for the balancing of competing interests which the court must carry out is the fact that under article 6(2) of

the Convention the seal hunters had a right to be presumed innocent of any criminal offence until proved guilty. By reason of the 'duties and responsibilities' inherent in the exercise of the freedom of expression, the safeguard afforded by article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith to provide accurate and reliable information in accordance with the ethics of journalism."

111 [Section 12\(4\) of the Human Rights Act 1998](#) provides:

"The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—(a) the extent to which—(i) the material has, or is about to, become available to the public; or (ii) it is, or would be, in the public interest for the material to be published; (b) any relevant privacy code."

But, as Sedley LJ said in [Douglas v Hello! Ltd \[2001\] QB 967](#) , 1003, para 133, you cannot have particular regard to article 10 without having equally particular regard at the very least to article 8 : see also [In re S \(A Child\) \(Identification: Restrictions on Publication\) \[2004\] Fam 43](#) , 72, para 52 where Hale LJ said that section 12(4) does not give either article pre-eminence over the other. These observations seem to me to be entirely consistent with the jurisprudence of the European court, as is the following passage in Sedley LJ's opinion in [Douglas](#) , at p 1005, para 137:

"The case being one which affects the Convention right of freedom of expression, [section 12](#) of the Human Rights Act 1998 requires the court to have regard to article 10 (as, in its absence, would [section 6](#)). This, however, cannot, consistently with [section 3](#) and article 17 , give the article 10(1) right of free expression a presumptive priority over other rights. What it does is require the court to consider article 10(2) along with article 10(1), and by doing so to bring into the frame the conflicting right to respect for privacy. This right, contained in article 8 and reflected in English law, is in turn qualified in both contexts by the right of others to ***489** free expression. The outcome, which self-evidently has to be the same under both articles, is determined principally by considerations of proportionality."

It is to be noted too that clause 3(i) of the Code of Practice of the Press Complaints Committee acknowledges this limitation. It states that a person may have a reasonable expectation of privacy in a public place.

Striking the balance

112 There is no doubt that the presentation of the material that it was legitimate to convey to the public in this case without breaching the duty of confidence was a matter for the journalists. The choice of language used to convey information and ideas, and decisions as to whether or not to accompany the printed word by the use of photographs, are pre-eminently editorial matters with which the court will not interfere. The respondents are also entitled to claim that they should be accorded a reasonable margin of appreciation in taking decisions as to what details needed to be included in the article to give it credibility. This is an essential part of the journalistic exercise.

113 But decisions about the publication of material that is private to the individual raise issues that are not simply about presentation and editing. Any interference with the public interest in disclosure has to be balanced against the interference with the right of the individual to respect for their private life. The decisions that are then taken are open to review by the court. The tests which the court must apply are the familiar ones. They are whether publication of the material pursues a legitimate aim and whether the benefits that will be achieved by its publication are proportionate to the harm that may be done by the interference with the right to privacy. The jurisprudence of the European Court of Human Rights explains how these principles are to be understood and applied in the context of the facts of each case. Any restriction of the right to freedom of expression must be subjected to very close scrutiny. But so too must any restriction of the right to respect for private life. Neither article 8 nor article 10 has any pre-eminence over the other in the conduct of this exercise. As Resolution 1165 of

the Parliamentary Assembly of the Council of Europe (1998), para 11, pointed out, they are neither absolute nor in any hierarchical order, since they are of equal value in a democratic society.

The article 10 right

114 In the present case it is convenient to begin by looking at the matter from the standpoint of the respondents' assertion of the article 10 right and the court's duty as a public authority under [section 6\(1\) of the Human Rights Act 1998](#), which [section 12\(4\)](#) reinforces, not to act in a way which is incompatible with that Convention right.

115 The first question is whether the objective of the restriction on the article 10 right—the protection of Miss Campbell's right under article 8 to respect for her private life—is sufficiently important to justify limiting the fundamental right to freedom of expression which the press assert on behalf of the public. It follows from my conclusion that the details of Miss Campbell's treatment were private that I would answer this question in the affirmative. The second question is whether the means chosen to limit [*490](#) the article 10 right are rational, fair and not arbitrary and impair the right as minimally as is reasonably possible. It is not enough to assert that it would be reasonable to exclude these details from the article. A close examination of the factual justification for the restriction on the freedom of expression is needed if the fundamental right enshrined in article 10 is to remain practical and effective. The restrictions which the court imposes on the article 10 right must be rational, fair and not arbitrary, and they must impair the right no more than is necessary.

116 In my opinion the factors that need to be weighed are, on the one hand, the duty that was recognised in [Jersild v Denmark 19 EHRR 1](#), para 31 to impart information and ideas of public interest which the public has a right to receive, and the need that was recognised in [Fressoz and Roire v France 31 EHRR 28](#), para 54 for the court to leave it to journalists to decide what material needs to be reproduced to ensure credibility; and, on the other hand, the degree of privacy to which Miss Campbell was entitled under the law of confidence as to the details of her therapy. Account should therefore be taken of the respondents' wish to put forward a story that was credible and to present Miss Campbell in a way that commended her for her efforts to overcome her addiction.

117 But it should also be recognised that the right of the public to receive information about the details of her treatment was of a much lower order than the undoubted right to know that she was misleading the public when she said that she did not take drugs. In [Dudgeon v United Kingdom \(1981\) 4 EHRR 149](#), para 52 the European court said that the more intimate the aspects of private life which are being interfered with, the more serious must be the reasons for doing so before the interference can be legitimate. Clayton & Tomlinson, *The Law of Human Rights* (2000), para 15.162, point out that the court has distinguished three kinds of expression: political expression, artistic expression and commercial expression, and that it consistently attaches great importance to political expression and applies rather less rigorous principles to expression which is artistic and commercial. According to the court's well-established case law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and the self-fulfilment of each individual: *Tammer v Estonia* (2001) 37 EHRR 857, para 59. But there were no political or democratic values at stake here, nor has any pressing social need been identified: contrast [Goodwin v United Kingdom \(1996\) 22 EHRR 123](#), para 40.

118 As for the other side of the balance, Keene LJ said in [Douglas v Hello! Ltd \[2001\] QB 967](#), 1012, para 168, that any consideration of article 8 rights must reflect the fact that there are different degrees of privacy. In the present context the potential for disclosure of the information to cause harm is an important factor to be taken into account in the assessment of the extent of the restriction that was needed to protect Miss Campbell's right to privacy.

The article 8 right

119 Looking at the matter from Miss Campbell's point of view and the protection of her article 8 Convention right, publication of details of the treatment which she was undertaking to cure her addiction—that she was [*491](#) attending Narcotics Anonymous, for how long, how frequently and at what times of day she had been attending this therapy, the nature of it and extent of her commitment to the process and the publication of the covertly taken photographs (the third, fourth and fifth of the five elements contained in the article)—had the potential to cause harm to her, for the reasons which I have already given. So I would attach a good deal of weight to this factor.

120 As for the other side of the balance, a person's right to privacy may be limited by the public's interest in knowing about certain traits of her personality and certain aspects of her private life, as L'Heureux-Dubé and Bastarache JJ in the Supreme Court of Canada recognised in *Aubry v Éditions Vice-Versa Inc* [1998] 1 SCR 591, paras 57-58. But it is not enough to deprive Miss Campbell of her right to privacy that she is a celebrity and that her private life is newsworthy. A margin of appreciation must, of course, be given to the journalist. Weight must be given to this. But to treat these details merely as background was to undervalue the importance that was to be attached to the need, if Miss Campbell was to be protected, to keep these details private. And it is hard to see that there was any compelling need for the public to know the name of the organisation that she was attending for the therapy, or for the other details of it to be set out. The presentation of the article indicates that this was not fully appreciated when the decision was taken to publish these details. The decision to publish the photographs suggests that greater weight was being given to the wish to publish a story that would attract interest rather than to the wish to maintain its credibility.

121 Had it not been for the publication of the photographs, and looking to the text only, I would have been inclined to regard the balance between these rights as about even. Such is the effect of the margin of appreciation that must, in a doubtful case, be given to the journalist. In that situation the proper conclusion to draw would have been that it had not been shown that the restriction on the article 10 right for which Miss Campbell argues was justified on grounds of proportionality. But the text cannot be separated from the photographs. The words "Therapy: Naomi outside meeting" underneath the photograph on the front page and the words "Hugs: Naomi, dressed in jeans and baseball hat, arrives for a lunchtime group meeting this week" underneath the photograph on p 13 were designed to link what might otherwise have been anonymous and uninformative pictures with the main text. The reader would undoubtedly make that link, and so too would the reasonable person of ordinary sensibilities. The reasonable person of ordinary sensibilities would also regard publication of the covertly taken photographs, and the fact that they were linked with the text in this way, as adding greatly overall to the intrusion which the article as a whole made into her private life.

122 The photographs were taken of Miss Campbell while she was in a public place, as she was in the street outside the premises where she had been receiving therapy. The taking of photographs in a public street must, as Randerson J said in *Hosking v Runting* [2003] 3 NZLR 385, 415, para 138, be taken to be one of the ordinary incidents of living in a free community. The real issue is whether publicising the content of the photographs would be offensive: *Gault and Blanchard JJ* in the Court of Appeal [2004] NZCA 34, para 165. A person who just happens to be in the ^{*492} street when the photograph was taken and appears in it only incidentally cannot as a general rule object to the publication of the photograph, for the reasons given by L'Heureux-Dubé and Bastarache JJ in *Aubry v Éditions Vice-Versa Inc* [1998] 1 SCR 591, para 59. But the situation is different if the public nature of the place where a photograph is taken was simply used as background for one or more persons who constitute the true subject of the photograph. The question then arises, balancing the rights at issue, where the public's right to information can justify dissemination of a photograph taken without authorisation: *Aubry*, para 61. The European court has recognised that a person who walks down a public street will inevitably be visible to any member of the public who is also present and, in the same way, to a security guard viewing the scene through closed circuit television: *PG and JH v United Kingdom* Reports of Judgments and Decisions 2001-ix, p 195, para 57. But, as the court pointed out in the same paragraph, private life considerations may arise once any systematic or permanent record comes into existence of such material from the public domain. In *Peck v United Kingdom* (2003) 36 EHRR 719, para 62 the court held that the release and publication of CCTV footage which showed the applicant in the process of attempting to commit suicide resulted in the moment being viewed to an extent that far exceeded any exposure to a passer-by or to security observation that he could have foreseen when he was in that street.

123 The same process of reasoning that led to the findings in *Peck* that the article 8 right had been violated and by the majority in *Aubry* that there had been an infringement of the claimant's right to respect for her private life can be applied here. Miss Campbell could not have complained if the photographs had been taken to show the scene in the street by a passer-by and later published simply as street scenes. But these were not just pictures of a street scene where she happened to be when the photographs were taken. They were taken deliberately, in secret and with a view to their publication in conjunction with the article. The zoom lens was directed at the doorway of the place where the meeting had been taking place. The faces of others in the doorway were pixelated so as not to reveal their identity. Hers was not, the photographs were published and her privacy was invaded. The argument that the publication of the photograph added credibility to the story has little weight. The photograph was not self-explanatory. Neither the place nor the person were instantly

recognisable. The reader only had the editor's word as to the truth of these details.

124 Any person in Miss Campbell's position, assuming her to be of ordinary sensibilities but assuming also that she had been photographed surreptitiously outside the place where she been receiving therapy for drug addiction, would have known what they were and would have been distressed on seeing the photographs. She would have seen their publication, in conjunction with the article which revealed what she had been doing when she was photographed and other details about her engagement in the therapy, as a gross interference with her right to respect for her private life. In my opinion this additional element in the publication is more than enough to outweigh the right to freedom of expression which the defendants are asserting in this case. *493

Conclusion

125 Despite the weight that must be given to the right to freedom of expression that the press needs if it is to play its role effectively, I would hold that there was here an infringement of Miss Campbell's right to privacy that cannot be justified. In my opinion publication of the third, fourth and fifth elements in the article (see para 88) was an invasion of that right for which she is entitled to damages. I would allow the appeal and restore the orders that were made by the trial judge.

BARONESS HALE OF RICHMOND

126 My Lords, this case raises some big questions. How is the balance to be struck between everyone's right to respect for their private and family life under article 8 of the European Convention on Human Rights and everyone's right to freedom of expression, including the freedom to receive and impart information and ideas under article 10? How do those rights come into play in a dispute between two private persons? But the parties are largely agreed about the answers to these. They disagree about where that balance is to be struck in the individual case. In particular, how far is a newspaper able to go in publishing what would otherwise be confidential information about a celebrity in order to set the record straight? And does it matter that the article was illustrated by a covertly taken photograph?

The facts

127 Even the judges know who Naomi Campbell is. On 1 February 2001, the "Daily Mirror" published a front-page article under the headline "Naomi: I am a drug addict". This did not refer to any public confession she had made. The "Mirror" had discovered that she was attending meetings of Narcotics Anonymous. It knew enough about those meetings to construct an article based on what would have gone on there. It had also discovered that this had been going on for some time and that on the day in question she had been to two meetings at different places in London. The front-page article had a small picture of her emerging from the first meeting. The fuller article spread across pp 12 and 13 had a larger picture of her and others outside a building with a prominent café signboard in the foreground. The others' faces were pixelated. The article gave a full account of her history of difficult behaviour but was sympathetic to her attempts to "beat the demons that have been haunting her". It quoted anonymous friends of hers, and acknowledged both the seriousness of her commitment to therapy and the fragility of her state of recovery.

128 The original source of the story was either a fellow sufferer attending NA meetings or a member of Miss Campbell's staff or entourage. The Mirror had sent along a photographer in the hope of catching her outside the meeting. This done, the editor rang her agent the evening before publication. He pretended that the photographer had happened to be in the street when he saw Miss Campbell coming out of a shop and followed her to the meeting. The agent told the editor that she had "no comment" but that NA was a "medical thing" and that it would be "morally wrong" to publish it.

129 At trial and ever since, however, it has been accepted that the Mirror was entitled to publish the fact that Miss Campbell was a drug addict *494 and was having therapy. She had publicly denied any involvement with illegal drugs, in particular in a television interview after an admission to a clinic in America in 1997, and the paper was entitled to put the record straight. It was also entitled, even obliged, to balance that disclosure with the fact that she was addressing the problem by having therapy. But, it was argued, the paper was not entitled to disclose that she was attending meetings of Narcotics Anonymous, or that she had been doing so for some time and with some frequency. Nor was it entitled to illustrate the story with covert photography of Miss Campbell in the company of other

participants in the meeting.

130 Proceedings for breach of confidence and infringement of privacy were issued that same day. At trial only the former was pursued (along with a claim under the Data Protection Act 1998 which it is agreed adds nothing to the claim for breach of confidence). The judge held that the information "giving details that [her treatment] was by regular attendance at NA meetings" clearly bore the badge of confidentiality. The details were obtained surreptitiously, assisted by covert photography when Miss Campbell was engaged, deliberately "low key and drably dressed", in the private activity of therapy to advance her recovery from drug addiction. Given the source, they must have been imparted in circumstances importing an obligation of confidence. Publication was to her detriment. It was, viewed objectively, likely to affect adversely her attendance and participation in therapy meetings. Although the disclosure of her addiction and previous lying denial caused her "considerable" distress, publication of the details about her sessions with NA caused her "significant" distress. Article 8 was thus engaged and striking the balance with article 10 she was entitled to a remedy.

131 The Court of Appeal reversed this decision. Given what it was accepted could be disclosed, the "peripheral details" about her attendance at NA were part of the "journalistic package" adding colour and credibility to the story without increasing the breach of confidence. As complaint could not be made about the taking of the photographs, their publication added nothing.

The basic principles

132 Neither party to this appeal has challenged the basic principles which have emerged from the Court of Appeal in the wake of the Human Rights Act 1998. The 1998 Act does not create any new cause of action between private persons. But if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties' Convention rights. In a case such as this, the relevant vehicle will usually be the action for breach of confidence, as Lord Woolf CJ held in [A v B plc \[2003\] QB 195](#), 202, para 4:

"[Articles 8 and 10] have provided new parameters within which the court will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court or whether the restriction of freedom of expression which such protection involves cannot be justified. The court's approach to the issues which the applications raise has been modified because, under [section 6 of the 1998 Act](#), the court, as a public authority, is required not to 'act in a way which *495 is incompatible with a Convention right'. The court is able to achieve this by absorbing the rights which articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of these articles."

133 The action for breach of confidence is not the only relevant cause of action: the inherent jurisdiction of the High Court to protect the children for whom it is responsible is another example: see [In re S \(A Child\) \(Identification: Restrictions on Publication\) \[2004\] Fam 43](#). But the courts will not invent a new cause of action to cover types of activity which were not previously covered: see [Wainwright v Home Office \[2004\] 2 AC 406](#). Mrs Wainwright and her disabled son suffered a gross invasion of their privacy when they were strip-searched before visiting another son in prison. The common law in this country is powerless to protect them. As they suffered at the hands of a public authority, the Human Rights Act 1998 would have given them a remedy if it had been in force at the time, but it was not. That case indicates that our law cannot, even if it wanted to, develop a general tort of invasion of privacy. But where existing remedies are available, the court not only can but must balance the competing Convention rights of the parties.

134 This begs the question of how far the Convention balancing exercise is premised on the scope of the existing cause of action. Clearly outside its scope is the sort of intrusion into what ought to be private which took place in [Wainwright](#). Inside its scope is what has been termed "the protection of the individual's informational autonomy" by prohibiting the publication of confidential information. How does the scope of the action for breach of confidence accommodate the article 8 rights of individuals? As Randerson J summed it up in [Hosking v Runting \[2003\] 3 NZLR 385](#), 403, para 83:

"[The English courts] have chosen to develop the claim for breach of confidence on a

case by case basis. In doing so, it has been recognised that no pre-existing relationship is required in order to establish a cause of action and that an obligation of confidence may arise from the nature of the material or may be inferred from the circumstances in which it has been obtained."

The position we have reached is that the exercise of balancing article 8 and article 10 may begin when the person publishing the information knows or ought to know that there is a reasonable expectation that the information in question will be kept confidential. That is the way in which Lord Woolf CJ put it in [A v B plc \[2003\] QB 195](#), 207, paras 11(ix) and (x) (in which he also referred to the approach of Dame Elizabeth Butler-Sloss P in [Venables v News Group Newspapers Ltd \[2001\] Fam 430](#)). It is, as I understand it, also the way in which it is put by my noble and learned friends, Lord Nicholls of Birkenhead (at para 21) and Lord Hope of Craighead (at para 84), in this case.

135 An objective reasonable expectation test is much simpler and clearer than the test sometimes quoted from the judgment of Gleeson CJ in the High Court of Australia in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 226, para 42, that "disclosure or ***496** observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities". It is important to set those words in their full context, bearing in mind that there is no constitutional protection of privacy in Australia:

"There is no bright line which can be drawn between what is private and what is not. Use of the term 'public' is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private."

136 It is apparent, therefore, that Gleeson CJ did not intend those last words to be the only test, particularly in respect of information which is obviously private, including information about health, personal relationships or finance. It is also apparent that he was referring to the sensibilities of a reasonable person placed in the situation of the subject of the disclosure rather than to its recipient.

137 It should be emphasised that the "reasonable expectation of privacy" is a threshold test which brings the balancing exercise into play. It is not the end of the story. Once the information is identified as "private" in this way, the court must balance the claimant's interest in keeping the information private against the countervailing interest of the recipient in publishing it. Very often, it can be expected that the countervailing rights of the recipient will prevail.

138 The parties agree that neither right takes precedence over the other. This is consistent with Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe, para 11:

"The Assembly reaffirms the importance of everyone's right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value."

139 Each right has the same structure. Article 8(1) states that "Everyone has the right to respect for his private and family life, his home and his correspondence". Article 10(1) states that "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...". Unlike the article 8 right, however, it is accepted in article 10(2) that the exercise of this right "carries with it duties and responsibilities". Both rights are qualified. They may respectively be

interfered with or restricted provided that three conditions ^{*497} are fulfilled. (a) The interference or restriction must be "in accordance with the law"; it must have a basis in national law which conforms to the Convention standards of legality. (b) It must pursue one of the legitimate aims set out in each article. Article 8(2) provides for "the protection of the rights and freedoms of others". Article 10(2) provides for "the protection of the reputation or rights of others" and for "preventing the disclosure of information received in confidence". The rights referred to may either be rights protected under the national law or, as in this case, other Convention rights. (c) Above all, the interference or restriction must be "necessary in a democratic society"; it must meet a "pressing social need" and be no greater than is proportionate to the legitimate aim pursued; the reasons given for it must be both "relevant" and "sufficient" for this purpose.

140 The application of the proportionality test is more straightforward when only one Convention right is in play: the question then is whether the private right claimed offers sufficient justification for the degree of interference with the fundamental right. It is much less straightforward when two Convention rights are in play, and the proportionality of interfering with one has to be balanced against the proportionality of restricting the other. As each is a fundamental right, there is evidently a "pressing social need" to protect it. The Convention jurisprudence offers us little help with this. The European Court of Human Rights has been concerned with whether the state's interference with privacy (as, for example, in Z v Finland (1997) 25 EHRR 371) or a restriction on freedom of expression (as, for example, in Jersild v Denmark (1994) 19 EHRR 1 , Fressoz and Roire v France (1999) 31 EHRR 28 , and Tammer v Estonia (2001) 37 EHRR 857) could be justified in the particular case. In the national court, the problem of balancing two rights of equal importance arises most acutely in the context of disputes between private persons.

141 Both parties accepted the basic approach of the Court of Appeal in In re S [2004] Fam 43 , 72-73, paras 54-60. This involves looking first at the comparative importance of the actual rights being claimed in the individual case; then at the justifications for interfering with or restricting each of those rights; and applying the proportionality test to each. The parties in this case differed about whether the trial judge or the Court of Appeal had done this, the appellant arguing that the Court of Appeal had assumed primacy for the article 10 right while the respondent argued that the trial judge had assumed primacy for the article 8 right.

Striking the balance

142 The considerations on each side in In re S were of an altogether more serious order than those in this case. On the one hand was respect for the private and family life of a little boy who had had his whole world turned upside down by the death of his older brother allegedly at the hands of his mother. He faced having to live and go to school with daily publicity about the most intimate details of his family life over the several months while his mother was being tried for his brother's murder. That publicity would include the names and photographs of both his mother and his brother from which he could readily be identified. There was psychiatric evidence of the harm which he was likely to suffer as a result. This would include not only the further increase in the already much heightened risk of mental illness in ^{*498} adulthood but also the harm to his relationship with his mother, which on any view was important to his continuing health and development. On the other hand was the public interest in the free reporting of murder trials. This is not only important in itself, as a manifestation both of freedom of expression and of freedom to receive information. It is also an essential component in a fair trial (albeit one which this accused was more than willing to relinquish for the sake of her surviving son) and in securing that justice is done in the open and not in secret, so that the public can have confidence in the system both in general and in the particular case. In In re S it was also possible to consider how the interference with each right might be minimised by tailoring the restrictions to meet the case: it was not an 'all or nothing' question.

143 No one can pretend that the interests at stake on either side of this case are anywhere near as serious as the interests involved in In re S . Some might even regard them as trivial. Put crudely, it is a prima donna celebrity against a celebrity-exploiting tabloid newspaper. Each in their time has profited from the other. Both are assumed to be grown-ups who know the score. On the one hand is the interest of a woman who wants to give up her dependence on illegal and harmful drugs and wants the peace and space in which to pursue the help which she finds useful. On the other hand is a newspaper which wants to keep its readers informed of the activities of celebrity figures, and to expose their weaknesses, lies, evasions and hypocrisies. This sort of story, especially if it has photographs attached, is just the sort of thing that fills, sells and enhances the reputation of the

newspaper which gets it first. One reason why press freedom is so important is that we need newspapers to sell in order to ensure that we still have newspapers at all. It may be said that newspapers should be allowed considerable latitude in their intrusions into private grief so that they can maintain circulation and the rest of us can then continue to enjoy the variety of newspapers and other mass media which are available in this country. It may also be said that newspaper editors often have to make their decisions at great speed and in difficult circumstances, so that to expect too minute an analysis of the position is in itself a restriction on their freedom of expression.

144 Examined more closely, however, this case is far from trivial. What is the nature of the private life, respect for which is in issue here? The information revealed by the article was information relating to Miss Campbell's health, both physical and mental. Drug abuse can be seriously damaging to physical health; indeed it is sometimes life-threatening. It can also lead to a wide variety of recognised mental disorders (see The ICD-10 Classification of Mental and Behavioural Disorders, WHO 1992, F10-F19). Drug addiction needs treatment if it is to be overcome. Treatment is at several levels. There is the quick "detox" to rid the body of the harmful substances. This will remove the immediate physical danger but does nothing to tackle the underlying dependence. Then there is therapy aimed at tackling that underlying dependence, which may be combined with a transfer of the dependence from illegal drugs to legally prescribed substitutes. Then there is therapy aimed at maintaining and reinforcing the resolve to keep up the abstinence achieved and prevent relapse. This is vital. Anyone who has had anything to do with drug addiction knows how easy it is to relapse once returned to the temptations of ***499** the life in which it began and how necessary it is to try, try and try again to achieve success.

145 It has always been accepted that information about a person's health and treatment for ill-health is both private and confidential. This stems not only from the confidentiality of the doctor-patient relationship but from the nature of the information itself. As the European Court of Human Rights put it in [Z v Finland 25 EHRR 371](#), 405-406, para 95:

"Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community."

146 The Court of Appeal in this case held that the information revealed here was not in the same category as clinical medical records. That may be so, in the sense that it was not the notes made by a doctor when consulted by a patient. But the information was of exactly the same kind as that which would be recorded by a doctor on those notes: the presenting problem was addiction to illegal drugs, the diagnosis was no doubt the same, and the prescription was therapy, including the self-help group therapy offered by regular attendance at Narcotics Anonymous.

147 I start, therefore, from the fact—indeed, it is common ground—that *all* of the information about Miss Campbell's addiction and attendance at NA which was revealed in the "Daily Mirror" article was both private and confidential, because it related to an important aspect of Miss Campbell's physical and mental health and the treatment she was receiving for it. It had also been received from an insider in breach of confidence. That simple fact has been obscured by the concession properly made on her behalf that the newspaper's countervailing freedom of expression did serve to justify the publication of some of this information. But the starting point must be that it was all private and its publication required specific justification.

148 What was the nature of the freedom of expression which was being asserted on the other side? There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life. Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full

part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value. No ***500** doubt there are other kinds of speech and expression for which similar claims can be made.

149 But it is difficult to make such claims on behalf of the publication with which we are concerned here. The political and social life of the community, and the intellectual, artistic or personal development of individuals, are not obviously assisted by pouring over the intimate details of a fashion model's private life. However, there is one way in which the article could be said to be educational. The editor had considered running a highly critical piece, adding the new information to the not inconsiderable list of Miss Campbell's faults and follies detailed in the article, emphasising the lies and hypocrisy it revealed. Instead he chose to run a sympathetic piece, still listing her faults and follies, but setting them in the context of her now-revealed addiction and her even more important efforts to overcome it. Newspaper and magazines often carry such pieces and they may well have a beneficial educational effect.

150 The crucial difference here is that such pieces are normally run with the co-operation of those involved. Private people are not identified without their consent. It is taken for granted that this is otherwise confidential information. The editor did offer Miss Campbell the opportunity of being involved with the story but this was refused. Her evidence suggests that she was concerned for the other people in the group. What entitled him to reveal this private information about her without her consent?

151 The answer which she herself accepts is that she had presented herself to the public as someone who was not involved in drugs. It would have been a very good thing if she were not. If other young women do see her as someone to be admired and emulated, then it is all to the good if she is not addicted to narcotic substances. It might be questioned why, if a role model has adopted a stance which all would agree is beneficial rather than detrimental to society, it is so important to reveal that she has feet of clay. But the possession and use of illegal drugs is a criminal offence and a matter of serious public concern. The press must be free to expose the truth and put the record straight.

152 That consideration justified the publication of the fact that, contrary to her previous statements, Miss Campbell had been involved with illegal drugs. It also justified publication of the fact that she was trying to do something about it by seeking treatment. It was not necessary for those purposes to publish any further information, especially if this might jeopardise the continued success of that treatment.

153 The further information includes the fact that she was attending Narcotics Anonymous meetings, the fact that she had been doing so for some time, and with some regularity, and the photographs of her either arriving at or leaving the premises where meetings took place. All of these things are inter-related with one another and with the effect which revealing them might have upon her. Revealing that she was attending Narcotics Anonymous enabled the paper to print the headline "Naomi: I am a drug addict", not because she had said so to the paper but because it could assume that she had said this or something like it in a meeting. It also enabled the paper to talk about the meetings and how she was treated there, in a way which made it look as if the information came from someone who had been there with her, even if it simply came from general knowledge of how these meetings work. This all contributed to the sense of betrayal by someone ***501** close to her of which she spoke and which destroyed the value of Narcotics Anonymous as a safe haven for her.

154 Publishing the photographs contributed both to the revelation and to the harm that it might do. By themselves, they are not objectionable. Unlike France and Quebec, in this country we do not recognise a right to one's own image: cf *Aubry v Éditions Vice-Versa Inc* [1998] 1 SCR 591 . We have not so far held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential. The activity photographed must be private. If this had been, and had been presented as, a picture of Naomi Campbell going about her business in a public street, there could have been no complaint. She makes a substantial part of her living out of being photographed looking stunning in designer clothing. Readers will obviously be interested to see how she looks if and when she pops out to the shops for a bottle of milk. There is nothing essentially private about that information nor can it be expected to damage her private life. It may not be a high order of freedom of speech but there is nothing to justify interfering with it. (This was the view of Randerson J in *Hosking v Runting* [2003] 3 NZLR 385 , which concerned a similarly innocuous outing; see now the decision of the Court of Appeal [2004] NZCA 34.)

155 But here the accompanying text made it plain that these photographs were different. They showed her coming either to or from the NA meeting. They showed her in the company of others, some of whom were undoubtedly part of the group. They showed the place where the meeting was taking place, which will have been entirely recognisable to anyone who knew the locality. A picture is "worth a thousand words" because it adds to the impact of what the words convey; but it also adds to the information given in those words. If nothing else, it tells the reader what everyone looked like; in this case it also told the reader what the place looked like. In context, it also added to the potential harm, by making her think that she was being followed or betrayed, and deterring her from going back to the same place again.

156 There was no need to do this. The editor accepted that even without the photographs, it would have been a front page story. He had his basic information and he had his quotes. There is no shortage of photographs with which to illustrate and brighten up a story about Naomi Campbell. No doubt some of those available are less flattering than others, so that if he had wanted to run a hostile piece he could have done so. The fact that it was a sympathetic story is neither here nor there. The way in which he chose to present the information he was entitled to reveal was entirely a matter for him. The photographs would have been useful in proving the truth of the story had this been challenged, but there was no need to publish them for this purpose. The credibility of the story with the public would stand or fall with the credibility of "Mirror" stories generally.

157 The weight to be attached to these various considerations is a matter of fact and degree. Not every statement about a person's health will carry the badge of confidentiality or risk doing harm to that person's physical or moral integrity. The privacy interest in the fact that a public figure has a cold or a broken leg is unlikely to be strong enough to justify restricting the press's freedom to report it. What harm could it possibly do? **502* Sometimes there will be other justifications for publishing, especially where the information is relevant to the capacity of a public figure to do the job. But that is not this case and in this case there was, as the judge found, a risk that publication would do harm. The risk of harm is what matters at this stage, rather than the proof that actual harm has occurred. People trying to recover from drug addiction need considerable dedication and commitment, along with constant reinforcement from those around them. That is why organisations like Narcotics Anonymous were set up and why they can do so much good. Blundering in when matters are acknowledged to be at a "fragile" stage may do great harm.

158 The trial judge was well placed to assess these matters. He could tell whether the impact of the story on her was serious or trivial. The fact that the story had been published at all was bound to cause distress and possibly interfere with her progress. But he was best placed to judge whether the additional information and the photographs had added significantly both to the distress and the potential harm. He accepted her evidence that it had done so. He could also tell how serious an interference with press freedom it would have been to publish the essential parts of the story without the additional material and how difficult a decision this would have been for an editor who had been told that it was a medical matter and that it would be morally wrong to publish it.

159 The judge was also obliged by [section 12\(4\)\(b\) of the 1998 Act](#), not only to have particular regard to the importance of the Convention right to freedom of expression, but also to any relevant privacy code. The Press Complaints Commission Code of Practice supports rather than undermines the conclusion he reached:

"3. ² Privacy

"(i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual's private life without consent. (ii) The use of long lens photography to take pictures of people in private places without their consent is unacceptable. Note—Private places are public or private property where there is a reasonable expectation of privacy.

" The public interest

"There may be exceptions to the clauses marked ³ where they can be demonstrated to be in the public interest.

"1. The public interest includes: (i) Detecting or exposing crime or a serious misdemeanour. (ii) Protecting public health and safety. (iii) Preventing the public from being misled by some statement or action of an individual or organisation ..."

This would appear to expect almost exactly the exercise conducted above and to lead to the same conclusion as the judge.

160 I would therefore allow this appeal and restore the order of the judge.

LORD CARSWELL

161 My Lords, I have had the advantage of reading in draft the opinions of my noble and learned friends, Lord Hope of Craighead and Baroness Hale of Richmond, and I agree with them that the appeal should be allowed.

***503**

162 The arguments advanced to your Lordships ranged over a wide spectrum of issues in the law of breach of confidence, but in the end they seemed to me to come down to fairly short points and straightforward questions, which involved the application of reasonably well settled principles.

163 The material in the article the subject of this appeal was divided by counsel into five categories, set out in para 88 of Lord Hope's opinion, to which I would refer. It was not in dispute that the information was imparted in confidence to the respondents, but that they were in the circumstances of the case justified in publishing that contained in the first two categories, the facts that the appellant was a drug addict and that she was receiving treatment for her addiction. These facts would ordinarily be regarded as matters of confidential information. The justification for their publication in this case, however, consists in the fact that the appellant is a well known figure who courts rather than shuns publicity, described as a role model for other young women, who had consistently lied about her drug addiction and compared herself favourably with others in the fashion business who were regular users of drugs. By these actions she had forfeited the protection to which she would otherwise have been entitled and made the information about her addiction and treatment a matter of legitimate public comment on which the press were entitled to put the record straight. The contest in this litigation centred round the question whether the respondents were on the same basis entitled to publish the material comprised in the third, fourth and fifth categories, as the Court of Appeal held, or whether it fell outside the class of information the subject of legitimate comment and should be treated as information received in confidence which should not have been published.

164 The Court of Appeal drew a distinction between the information that the appellant was receiving therapy from Narcotics Anonymous and details of the treatment of a medical condition, regarding the latter but not the former as private information. They did not regard it as more than a "peripheral disclosure" and considered that the publication of the details given in the "Mirror" about the appellant's attendance at NA meetings was not in its context sufficiently significant to amount to a breach of duty of confidence owed to her. They held that a reasonable person of ordinary sensibilities, on reading that the appellant was a drug addict, would not find it offensive that the "Mirror" newspaper also disclosed that she was attending meetings of Narcotics Anonymous (para 54 of their judgment). It was therefore not of sufficient significance to shock the conscience and justify the intervention of the court (para 56).

165 I am unable to agree with the distinction drawn by the Court of Appeal and for the reasons given by Lord Hope and Lady Hale I consider that the information was private. It seems to me that the publication of the details of the appellant's course of treatment at NA and of the photographs taken surreptitiously in the street of her emerging from a meeting went significantly beyond the publication of the fact that she was receiving therapy or that she was engaged in a course of therapy with NA. It revealed where the treatment was taking place and the text went into the frequency of her treatment. In this way it intruded into what had some of the characteristics of medical treatment and it tended to deter her from continuing the treatment which was in her interest and also to inhibit other ***504** persons attending the course from staying with it, when they might be concerned that their participation might become public knowledge. This in my view went beyond disclosure which was, in the words of the Court of Appeal, "peripheral to" the publication of the information that the appellant was a drug addict who was receiving treatment and was capable of constituting breach of confidence. One cannot disregard the fact that photographs are a powerful prop to a written article and a much valued part of newspaper reporting, especially in the tabloid or popular press (hence the enthusiasm of paparazzi to obtain pictures of celebrities for publication in the newspapers). I think that the Court of Appeal dismissed them too readily as adding little to the reports already published and that they were not justified in rejecting the judge's conclusions on this.

166 It follows that it is not necessary in this case to ask, in the terms formulated in the judgment of

Gleeson CJ in *Australian Broadcasting Corpn v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 , 226, para 41, whether disclosure of the information would be highly offensive to a reasonable person of ordinary sensibilities. It is sufficiently established by the nature of the material that it was private information which attracted the duty of observing the confidence in which it was imparted to the respondents. It also follows in my opinion that the motives of the respondents in publishing the information, which they claim to have done in order to give a sympathetic treatment to the subject, do not constitute a defence, if the publication of the material in the third, fourth and fifth categories revealed confidential material.

167 One must then move to the balancing exercise, which involves consideration of articles 8 and 10 of the European Convention on Human Rights, the process which was described in some detail by Lord Woolf CJ in para 11 of his judgment in [A v B plc \[2003\] QB 195](#) , 204-210. The carrying out of the balancing is at the centre of this case and forms the point at which the two currents of opinion divide. I agree with the analysis contained in paras 105 to 113 of Lord Hope's opinion in the present appeal and am gratefully content to adopt it. I also agree with him that in order to justify limiting the article 10 right to freedom of expression the restrictions imposed must be rational, fair and not arbitrary, and they must impair the right no more than necessary.

168 Resolution of this question depends on the weight which one attributes to several factors, the extent of the distress to the appellant and the potential adverse effects on her drug therapy, the extent to which one judges the material in categories 3, 4 and 5 to have gone beyond that contained in categories 1 and 2, and the degree of latitude which should be allowed to the press in the way in which it chooses to present a story. Weighing and balancing these factors is a process which may well lead different people to different conclusions, as one may readily see from consideration of the judgments of the courts below and the opinions given by the several members of the Appellate Committee of your Lordships' House.

169 In my opinion it is a delicately balanced decision, and the answer to the questions which one must ask is by no means self-evident. My own conclusion is the same as that reached by Lord Hope and Lady Hale. My reasons can be expressed in fairly short compass. Publication of the details about the appellant's attendance at therapy carried out by NA, highlighted by the photographs printed, constituted in my judgment a considerable *505 intrusion into her private affairs, which was capable of causing substantial distress, and on her evidence did cause it to her. It is difficult to assess how much, if any, actual harm it may have done to her progress in therapy. In her evidence the appellant said that she had not gone back to the World's End centre of NA since the article was published and that she had only attended about four meetings in other centres in England, though she had gone to meetings abroad and met privately at her home with other NA attendees. It seems to me clear, however, that the publication of the article did create a risk of causing a significant setback to her recovery. In favour of the respondents it is urged that the material in categories 3, 4 and 5 differed very little in kind from that in categories 1 and 2, the view which found favour with the Court of Appeal. My noble and learned friends, Lord Nicholls of Birkenhead and Lord Hoffmann, also emphasised the importance of allowing a proper degree of journalistic margin to the press to deal with a legitimate story in its own way, without imposing unnecessary shackles on its freedom to publish detail and photographs which add colour and conviction. I do not minimise these factors, which are part of the legitimate function of a free press and require to be given proper weight.

170 In my opinion the balance comes down in favour of the appellant on the issues in this appeal. I would not myself attempt to isolate which of the contents of categories 3, 4 and 5 is more harmful or tips the balance. I find it sufficient to hold that the information contained in categories 3 and 4, allied to the photographs in category 5, went significantly beyond the revelation that the appellant was a drug addict and was engaged in drug therapy. I consider that it constituted such an intrusion into the appellant's private affairs that the factors relied upon by respondents do not suffice to justify publication. I am unable to accept that such publication was necessary to maintain the newspaper's credibility.

171 I would accordingly hold that the publication of the third, fourth and fifth elements in the article constituted an infringement of the appellant's right to privacy that cannot be justified and that she is entitled to a remedy. I would allow the appeal and restore the judge's order.

Appeal allowed with costs. Order of Morland J restored.

Representation

Solicitors: Schillings ; Davenport Lyons .

S H

1. Human Rights Act 1998, s. 12(4): see post, para 111. Sch 1, Pt I, art 8: "(1) Everyone has the right to respect for his private and family life ... (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of the rights and freedoms of others." Art 10: "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information ... (2) The exercise of these freedoms ... may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence ..."

2. Missing footnote number: 1

3. Missing footnote number: 2

(c) Incorporated Council of Law Reporting for England & Wales

© 2011 Sweet & Maxwell

Westlaw[®] UK

HEINONLINE

Citation: 269 U.S. 385 1925

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Mon Apr 18 13:05:46 2011

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.

Argument for Appellants.

CONNALLY, COMMISSIONER, ET AL. v. GENERAL
CONSTRUCTION COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 314. Argued November 30, December 1, 1925.—Decided January 4, 1926.

1. A criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application, lacks the first essential of due process of law. P. 391.
2. Oklahoma Comp. Stats. 1921, §§ 7255, 7257, imposing severe, cumulative punishments upon contractors with the State who pay their workmen less than the "current rate of per diem wages in the locality where the work is performed,"—*held* void for uncertainty. P. 393.
- 3 Fed. (2d) 666, affirmed.

APPEAL from a decree of the District Court awarding an interlocutory injunction, upon the bill and a motion to dismiss it (demurrer), in a suit to restrain state and county officials of Oklahoma from enforcing a statute purporting, *inter alia*, to prescribe a minimum for the wages of workmen employed by contractors in the execution of contracts with the State, and imposing fine or imprisonment for each day's violation.

Messrs. George F. Short, Attorney General of Oklahoma, and J. Berry King, with whom Mr. Leon S. Hirsh was on the brief, for appellants.

The constitutionality of statutes is the strongest presumption known to the courts. *United States v. Brewer*, 139 U. S. 278; *State ex rel. Hastings v. Smith*, 35 Neb. 13; *State v. Lancashire Fire Ins. Co.*, 66 Ark. 466; *Commonwealth v. Libbey*, 216 Mass. 356. The "Current Wage Law" meets all the requirements of definiteness considered in cases involving other statutes dependent upon a

state of mind, the Oklahoma law being dependent upon a given state of facts, readily ascertainable. *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86. Decisions upon the Sherman Anti-Trust Act are undoubtedly of considerable bearing in a case of this type, for had not a more liberal construction been there indulged than is required of the "Current Wage Law," the term "undue and unreasonable restraint of trade" would never have been considered sufficiently definite to sustain a prosecution as due process of law. *Standard Oil Co. v. United States*, 221 U. S. 31. See *United States v. Reading Co.*, 226 U. S. 84; *United States v. American Tobacco Co.*, 221 U. S. 106; *United States v. Eastman Kodak Co.*, 226 Fed. 65; and *Northern Securities Co. v. United States*, 193 U. S. 197—all defining, in one way or another, what acts are "undue and unreasonable" acts, contracts or combinations resulting in, or tending to result in a monopoly or restraint of trade. *United States v. Trans-Missouri Freight Ass'n.*, 166 U. S. 290. *Nash v. United States*, 229 U. S. 373, foreclosed the entire question of vagueness and uncertainty. *United States v. Patterson*, 201 Fed. 697. In *State v. Tibbetts*, 205 Pac. 776, the question of uncertainty by reason of the term "current rate of per diem wages" was not involved; but the statute was attacked on rehearing for uncertainty of the term "locality" and held to be valid. Indefiniteness as to the term "locality" cannot be asserted by appellee since the *Tibbetts Case* and the *Waters-Pierce Oil Company Case* definitely foreclose that question.

Were it not for this proviso as to wages, the entire salutary effect of the "Eight Hour Law" would be aborted. General classes of labor maintain a fairly uniform rate of pay—what might properly be termed a "market price." Such was the recognition given to the term "prevailing rate of wages" in *Ryan v. City of New York*, 79 N. Y. S. 599 and *McMahon v. City of New York*, 47 N. Y. S. 1018. There can be but one prevailing or

market scale for each type of labor. In each locality there must be a current rate dictated by the law of supply and demand, modified by the standard of living in the particular community, the price of commodities and other various elements.

See *People ex rel. Rodgers v. Coler*, 166 N. Y. 1; *People v. Crane*, 214 N. Y. 154; *Fox v. Washington*, 236 U. S. 273; *Mutual Film Corp. v. Industrial Commission*, 236 U. S. 246; *Ellis v. United States*, 206 U. S. 246; *Bradford v. State*, 78 Tex. Cr. 285; *Commonwealth v. Reilly*, 142 N. E. 915; *Galveston, H. & S. A. Ry. v. Enderle*, 170 S. W. 278; *State v. Texas & Pacific R. Co.*, 106 Tex. 18; *Morse v. Brown*, 206 Fed. 232.

Statutes containing such provisions as prohibiting the driving of vehicles "at a speed greater than is reasonable or prudent" have been held, in numerous cases, to be valid against the charge of vagueness and uncertainty of the offense prescribed. See also *State v. Quinlan*, 86 N. J. L. 120; *United States v. Sacks of Flour*, 180 Fed. 518; *Aiton v. Bd. of Medical Examiners*, 13 Ariz. 354; *People v. Apflebaum*, 251 Ill. 18; *Klafter v. State Bd. of Examiners*, 259 Ill. 15; *Katzman v. Commonwealth*, 140 Ky. 124; *State v. Lawrence*, 9 Okla. Cr. 16; *Stewart v. State*, 4 Okla. Cr. 564; *Mustard v. Elwood*, 223 Fed. 225; *Miller v. United States*, 41 App. D. C. 52; *Keefer v. State*, 174 Ind. 255; *State v. Newman Lbr. Co.*, 102 Miss. 802; *Tanner v. Little*, 240 U. S. 369; *Pitney v. Washington*, 240 U. S. 387; *United States v. United States Brewers' Ass'n.*, 239 Fed. 163; *Denver Jobbers' Ass'n. v. People ex rel. Dixon*, 21 Colo. App. 350.

A close study of all of the foregoing decisions demonstrates that a mental attitude as the standard of certainty almost invariably sustains the constitutionality of a statute. Where the standard is dependent upon a condition or state of facts, ascertainable by investigation, as a "cur-

rent rate or per diem wages" in a given locality, a law based thereon is within all requirements of "due process."

There is no unlawful delegation of legislative power in the provision, in the Oklahoma labor laws, that the Commissioner of Labor is to carry into effect all the laws in relation to labor, passed by the Legislature of the State.

The provisions in question are not in conflict with the Federal Constitution as a taking of private property without compensation, nor as an interference with the freedom of contract.

Mr. J. D. Lydick, with whom *Messrs. Charles E. McPherren, K. C. Sturdevant and Irvin L. Wilson* were on the brief, for appellee.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a suit to enjoin certain state and county officers of Oklahoma from enforcing the provisions of § 7255 and § 7257, Compiled Oklahoma Statutes, 1921, challenged as unconstitutional. Section 7255 creates an eight-hour day for all persons employed by or on behalf of the state, etc., and provides "that not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics, prison guards, janitors in public institutions, or other persons so employed by or on behalf of the State, . . . and laborers, workmen, mechanics, or other persons employed by contractors or subcontractors in the execution of any contract or contracts with the State, . . . shall be deemed to be employed by or on behalf of the State, . . ." For any violation of the section, a penalty is imposed by § 7257 of a fine of not less than fifty nor more than five hundred dollars or imprisonment for not less than three nor more than six months. Each day that the violation continues is declared to be a separate offense.

The material averments of the bill, shortly stated, are to the following effect: The construction company, under contracts with the state, is engaged in constructing certain bridges within the state. In such work, it employs a number of laborers, workmen and mechanics, with each of whom it has agreed as to the amount of wages to be paid upon the basis of an eight-hour day; and the amount so agreed upon is reasonable and commensurate with the services rendered and agreeable to the employee in each case.

The Commissioner of Labor complained that the rate of wages paid by the company to laborers was only \$3.20 per day, whereas, he asserted, the current rate in the locality where the work was being done was \$3.60, and gave notice that, unless advised of an intention immediately to comply with the law, action would be taken to enforce compliance. From the correspondence set forth in the bill, it appears that the commissioner based his complaint upon an investigation made by his representative concerning wages "paid to laborers in the vicinity of Cleveland," Oklahoma, near which town one of the bridges was being constructed. This investigation disclosed the following list of employers with the daily rate of wages paid by each: City, \$3.60 and \$4.00; Johnson Refining Co., \$3.60 and \$4.05; Prairie Oil & Gas, \$4.00; Gypsy Oil Co., \$4.00; Gulf Pipe Line Co., \$4.00; Brickyard, \$3.00 and \$4.00; I. Hansen, \$3.60; General Construction Co., \$3.20; Moore & Pitts Ice Co., \$100 per month; Cotton Gins, \$3.50 and \$4.00; Mr. Pitts, \$4.00; Prairie Pipe Line Co., \$4.00; C. B. McCormack, \$3.00; Harry McCoy, \$3.00. The scale of wages paid by the construction company to its laborers was stated to be as follows: 6 men @ \$3.20 per day; 7 men @ \$3.60; 4 men @ \$4.00; 2 men @ \$4.40; 4 men @ \$4.80; 1 man @ \$5.20; and 1 man @ \$6.50.

In determining the rate of wages to be paid by the company, the commissioner claimed to be acting under

authority of a statute of Oklahoma which imposes upon him the duty of carrying into effect all laws in relation to labor. In the territory surrounding the bridges being constructed by plaintiff, there is a variety of work performed by laborers, etc., the value of whose services depends upon the class and kind of labor performed and the efficiency of the workmen. Neither the wages paid nor the work performed are uniform; wages have varied since plaintiff entered into its contracts for constructing the bridges and employing its men; and it is impossible to determine under the circumstances whether the sums paid by the plaintiff or the amount designated by the commissioner or either of them constitute the current per diem wage in the locality. Further averments are to the effect that the commissioner has threatened the company and its officers, agents and representatives with criminal prosecutions under the foregoing statutory provisions, and, unless restrained, the county attorneys for various counties named will institute such prosecutions; and that, under § 7257, providing that each day's failure to pay current wages shall constitute a separate offense, maximum penalties may be inflicted aggregating many thousands of dollars in fines and many years of imprisonment.

The constitutional grounds of attack, among others, are that the statutory provisions, if enforced, will deprive plaintiff, its officers, agents and representatives, of their liberty and property without due process of law, in violation of the Fourteenth Amendment to the federal Constitution; that they contain no ascertainable standard of guilt; that it cannot be determined with any degree of certainty what sum constitutes a current wage in any locality; and that the term "locality" itself is fatally vague and uncertain. The bill is a long one, and, without further review, it is enough to say that, if the constitutional attack upon the statute be sustained, the averments justify the equitable relief prayed.

Upon the bill and a motion to dismiss it, in the nature of a demurrer attacking its sufficiency, an application for an interlocutory injunction was heard by a court of three judges, under § 266 Jud. Code, and granted; the allegations of the bill being taken as true. 3 Fed. (2d) 666.

That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221; *Collins v. Kentucky*, 234 U. S. 634, 638.

The question whether given legislative enactments have been thus wanting in certainty has frequently been before this court. In some of the cases the statutes involved were upheld; in others, declared invalid. The precise point of differentiation in some instances is not easy of statement. But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 502; *Omaechevarria v. Idaho*, 246 U. S. 343, 348, or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, *Nash v. United States*, 229 U. S. 373, 376; *International Harvester Co. v. Kentucky*, *supra*, p. 223, or, as broadly stated by Mr. Chief Justice White in *United States v. Cohen Grocery Co.*, 255 U. S. 81, 92, "that, for reasons found to

result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded." See also, *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U. S. 86, 108. Illustrative cases on the other hand are *International Harvester Co. v. Kentucky*, *supra*, *Collins v. Kentucky*, *supra*, and *United States v. Cohen Grocery Co.*, *supra*, and cases there cited. The *Cohen Grocery Case* involved the validity of § 4 of the Food Control Act of 1917, which imposed a penalty upon any person who should make "any unjust or unreasonable rate or charge in handling or dealing in or with any necessities." It was held that these words fixed no ascertainable standard of guilt, in that they forbade no specific or definite act.

Among the cases cited in support of that conclusion is *United States v. Capital Traction Co.*, 34 App. D. C. 592, where a statute making it an offense for any street railway company to run an insufficient number of cars to accommodate passengers "without crowding," was held to be void for uncertainty. In the course of its opinion, that court said (pp. 596, 598):

"The statute makes it a criminal offense for the street railway companies in the District of Columbia to run an insufficient number of cars to accommodate persons desiring passage thereon, without crowding the same. What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. . . . There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment.

" . . . The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

In the light of these principles and decisions, then, we come to the consideration of the legislation now under review, requiring the contractor, at the risk of incurring severe and cumulative penalties, to pay his employees "not less than the current rate of per diem wages in the locality where the work is performed."

We are of opinion that this provision presents a double uncertainty, fatal to its validity as a criminal statute. In the first place, the words "current rate of wages" do not denote a specific or definite sum, but minimum, maximum and intermediate amounts, indeterminately, varying from time to time and dependent upon the class and kind of work done, the efficiency of the workmen, etc., as the bill alleges is the case in respect of the territory surrounding the bridges under construction.* The statutory phrase reasonably cannot be confined to any of these amounts, since it imports each and all of them. The

* The commissioner's own investigation shows that wages ranged from \$3.00 to \$4.05 per day; and the scale of wages paid by the construction company to its laborers, twenty-five in number, ranged from \$3.20 to \$6.50 per day, all but six of them being paid at \$3.60 or more.

"current rate of wages" is not simple but progressive—from so much (the minimum) to so much (the maximum), including all between; and to direct the payment of an amount which shall not be less than one of several different amounts, without saying which, is to leave the question of what is meant incapable of any definite answer. See *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 24–25.

Nor can the question be solved by resort to the established canons of construction that enable a court to look through awkward or clumsy expression, or language wanting in precision, to the intent of the legislature. For the vice of the statute here lies in the impossibility of ascertaining, by any reasonable test, that the legislature meant one thing rather than another, and in the futility of an attempt to apply a requirement, which assumes the existence of a rate of wages single in amount, to a rate in fact composed of a multitude of gradations. To construe the phrase "current rate of wages" as meaning either the lowest rate or the highest rate or any intermediate rate or, if it were possible to determine the various factors to be considered, an average of all rates, would be as likely to defeat the purpose of the legislature as to promote it. See *State v. Partlow*, 91 N. C. 550, 553; *Commonwealth v. Bank of Pennsylvania*, 3 Watts & S. 173, 177.

In the second place, additional obscurity is imparted to the statute by the use of the qualifying word "locality." Who can say, with any degree of accuracy, what areas constitute the locality where a given piece of work is being done? Two men moving in any direction from the place of operations, would not be at all likely to agree upon the point where they had passed the boundary which separated the locality of that work from the next locality. It is said that this question is settled for us by the decision of the criminal court of appeals on rehearing in *State v. Tibbetts*, 205 Pac. 776, 779. But all the court did there was to define the word "locality" as meaning "place."

"near the place," "vicinity," or "neighborhood." Accepting this as correct, as of course we do, the result is not to remove the obscurity, but rather to offer a choice of uncertainties. The word "neighborhood" is quite as susceptible of variation as the word "locality." Both terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles. See *Schmidt v. Kansas City Distilling Co.*, 90 Mo. 284, 296; *Woods v. Cochrane and Smith*, 38 Iowa 484, 485; *State ex rel. Christie v. Meek*, 26 Wash. 405, 407-408; *Millville Imp. Co. v. Pitman, etc., Gas Co.*, 75 N. J. Law 410, 412; *Thomas v. Marshfield*, 10 Pick. 364, 367. The case last cited held that a grant of common to the inhabitants of a certain neighborhood was void because the term "neighborhood" was not sufficiently certain to identify the grantees. In other connections or under other conditions the term "locality" might be definite enough, but not so in a statute such as that under review imposing criminal penalties. Certainly, the expression "near the place" leaves much to be desired in the way of a delimitation of boundaries; for it at once provokes the inquiry, "how near?" And this element of uncertainty cannot here be put aside as of no consequence, for, as the rate of wages may vary—as in the present case it is alleged it does vary—among different employers and according to the relative efficiency of the workmen, so it may vary in different sections. The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal.

Interlocutory decree affirmed.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concur in the result on the ground that the plaintiff was not violating the statute by any criterion available in the vicinity of Cleveland.

PERRY BROWNING ET AL. v. E. M. HOOPER ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS.

No. 256. Argued November 17, 1925.—Decided January 4, 1926.

1. A Texas statute authorizes fifty property taxpaying voters, by petition to the commissioners' court of a county, to designate territory of which they are residents within the county as a road district and the amount of bonds to be issued for road improvements within the district, not to exceed one-fourth of the assessed value of real property therein, whereupon it becomes the duty of the commissioners' court to order an election in the district, as so described, for the purpose of determining whether the bonds in the amount named in the petition shall be issued and whether a tax shall be levied upon the property of the district for their payment; and if two-thirds of the votes at such election favor the proposition, the commissioners' court is required to issue and sell the bonds and levy a tax sufficient to pay them as they mature, by assessments on the same valuation, and which become liens and may be enforced in the same manner, as state and county taxes. *Held*, (a) that assessments so authorized and levied were special assessments for local improvements, not general taxes; (b) that a district so created could not be regarded as one created by the legislature, even though coincident in boundaries with two adjacent "commissioners' precincts"; (c) that the assessments were not legislative assessments. P. 403.
2. Where a special improvement district is not created by the legislature or a municipality to which the State has granted full legislative powers over the subject, and where there has been no legislative determination that the property to be assessed for the improvement will be benefited thereby, it is essential to due process of law that the property owner be given notice and an opportunity to be heard on the question of benefits. P. 405.
- 3 Fed. (2d) 160, reversed.

HEINONLINE

Citation: 315 U.S. 568 1941

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Mon Apr 18 12:48:13 2011

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.

CHAPLINSKY *v.* NEW HAMPSHIRE.

APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE.

No. 255. Argued February 5, 1942.—Decided March 9, 1942.

1. That part of c. 378, § 2, of the Public Laws of New Hampshire which forbids under penalty that any person shall address “any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place,” or “call him by any offensive or derisive name,” was construed by the Supreme Court of the State, in this case and before this case arose, as limited to the use in a public place of words directly tending to cause a breach of the peace by provoking the person addressed to acts of violence.

Held:

- (1) That, so construed, it is sufficiently definite and specific to comply with requirements of due process of law. P. 573.

- (2) That as applied to a person who, on a public street, addressed another as a “damned Fascist” and a “damned racketeer,” it does not substantially or unreasonably impinge upon freedom of speech. P. 574.

- (3) The refusal of the state court to admit evidence offered by the defendant tending to prove provocation and evidence bearing on the truth or falsity of the utterances charged is open to no constitutional objection. P. 574.

2. The Court notices judicially that the appellations “damned racketeer” and “damned Fascist” are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace. P. 574.

91 N. H. 310, 18 A. 2d 754, affirmed.

APPEAL from a judgment affirming a conviction under a state law denouncing the use of offensive words when addressed by one person to another in a public place.

Mr. Hayden C. Covington, with whom *Mr. Joseph F. Rutherford* was on the brief, for appellant. *Mr. Alfred A. Albert* entered an appearance.

Mr. Frank R. Kenison, Attorney General of New Hampshire, with whom *Mr. John F. Beamis, Jr.* was on the brief for appellee.

MR. JUSTICE MURPHY delivered the opinion of the Court.

Appellant, a member of the sect known as Jehovah's Witnesses, was convicted in the municipal court of Rochester, New Hampshire, for violation of Chapter 378, § 2, of the Public Laws of New Hampshire:

"No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."

The complaint charged that appellant, "with force and arms, in a certain public place in said city of Rochester, to wit, on the public sidewalk on the easterly side of Wakefield Street, near unto the entrance of the City Hall, did unlawfully repeat, the words following, addressed to the complainant, that is to say, 'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists,' the same being offensive, derisive and annoying words and names."

Upon appeal there was a trial *de novo* of appellant before a jury in the Superior Court. He was found guilty and the judgment of conviction was affirmed by the Supreme Court of the State. 91 N. H. 310, 18 A. 2d 754.

By motions and exceptions, appellant raised the questions that the statute was invalid under the Fourteenth Amendment of the Constitution of the United States, in that it placed an unreasonable restraint on freedom of speech, freedom of the press, and freedom of worship, and because it was vague and indefinite. These contentions were overruled and the case comes here on appeal.

There is no substantial dispute over the facts. Chaplinsky was distributing the literature of his sect on the streets

of Rochester on a busy Saturday afternoon. Members of the local citizenry complained to the City Marshal, Bowering, that Chaplinsky was denouncing all religion as a "racket." Bowering told them that Chaplinsky was lawfully engaged, and then warned Chaplinsky that the crowd was getting restless. Some time later, a disturbance occurred and the traffic officer on duty at the busy intersection started with Chaplinsky for the police station, but did not inform him that he was under arrest or that he was going to be arrested. On the way, they encountered Marshal Bowering, who had been advised that a riot was under way and was therefore hurrying to the scene. Bowering repeated his earlier warning to Chaplinsky, who then addressed to Bowering the words set forth in the complaint.

Chaplinsky's version of the affair was slightly different. He testified that, when he met Bowering, he asked him to arrest the ones responsible for the disturbance. In reply, Bowering cursed him and told him to come along. Appellant admitted that he said the words charged in the complaint, with the exception of the name of the Deity.

Over appellant's objection the trial court excluded, as immaterial, testimony relating to appellant's mission "to preach the true facts of the Bible," his treatment at the hands of the crowd, and the alleged neglect of duty on the part of the police. This action was approved by the court below, which held that neither provocation nor the truth of the utterance would constitute a defense to the charge.

It is now clear that "Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state

action." *Lovell v. Griffin*, 303 U. S. 444, 450.¹ Freedom of worship is similarly sheltered. *Cantwell v. Connecticut*, 310 U. S. 296, 303.

Appellant assails the statute as a violation of all three freedoms, speech, press and worship, but only an attack on the basis of free speech is warranted. The spoken, not the written, word is involved. And we cannot conceive that cursing a public officer is the exercise of religion in any sense of the term. But even if the activities of the appellant which preceded the incident could be viewed as religious in character, and therefore entitled to the protection of the Fourteenth Amendment, they would not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute. We turn, therefore, to an examination of the statute itself.

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances.² There are certain well-defined and narrowly limited classes of speech, the prevention

¹ See also *Bridges v. California*, 314 U. S. 252; *Cantwell v. Connecticut*, 310 U. S. 296, 303; *Thornhill v. Alabama*, 310 U. S. 88, 95; *Schneider v. State*, 308 U. S. 147, 160; *De Jonge v. Oregon*, 299 U. S. 353, 364; *Grosjean v. American Press Co.*, 297 U. S. 233, 243; *Near v. Minnesota*, 283 U. S. 697, 707; *Stromberg v. California*, 283 U. S. 359, 368; *Whitney v. California*, 274 U. S. 357, 362, 371, 373; *Gitlow v. New York*, 268 U. S. 652, 666.

Appellant here pitches his argument on the due process clause of the Fourteenth Amendment.

² *Schenck v. United States*, 249 U. S. 47; *Whitney v. California*, 274 U. S. 357, 373 (Brandeis, J., concurring); *Stromberg v. California*, 283 U. S. 359; *Near v. Minnesota*, 283 U. S. 697; *De Jonge v. Oregon*, 299 U. S. 353; *Herndon v. Lowry*, 301 U. S. 242; *Cantwell v. Connecticut*, 310 U. S. 296.

and punishment of which have never been thought to raise any Constitutional problem.³ These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.⁴ It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.⁵ "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Cantwell v. Connecticut*, 310 U. S. 296, 309-310.

The state statute here challenged comes to us authoritatively construed by the highest court of New Hampshire. It has two provisions—the first relates to words or names addressed to another in a public place; the second refers to noises and exclamations. The court said: "The two provisions are distinct. One may stand separately from the other. Assuming, without holding, that the second were unconstitutional, the first could stand if constitutional." We accept that construction of severability and limit our consideration to the first provision of the statute.⁶

³ The protection of the First Amendment, mirrored in the Fourteenth, is not limited to the Blackstonian idea that freedom of the press means only freedom from restraint prior to publication. *Near v. Minnesota*, 283 U. S. 697, 714-715.

⁴ Chafee, *Free Speech in the United States* (1941), 149.

⁵ Chafee, *op. cit.*, 150.

⁶ Since the complaint charged appellant only with violating the first provision of the statute, the problem of *Stromberg v. California*, 283 U. S. 359, is not present.

On the authority of its earlier decisions, the state court declared that the statute's purpose was to preserve the public peace, no words being "forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed."⁷ It was further said: "The word 'offensive' is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker—including 'classical fighting words', words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."

We are unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression. It is a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace. Cf. *Cantwell v. Connecticut*, 310 U. S. 296, 311; *Thornhill v. Alabama*,

⁷ *State v. Brown*, 68 N. H. 200, 38 A. 731; *State v. McConnell*, 70 N. H. 294, 47 A. 267.

310 U. S. 88, 105. This conclusion necessarily disposes of appellant's contention that the statute is so vague and indefinite as to render a conviction thereunder a violation of due process. A statute punishing verbal acts, carefully drawn so as not unduly to impair liberty of expression, is not too vague for a criminal law. Cf. *Fox v. Washington*, 236 U. S. 273, 277.⁸

Nor can we say that the application of the statute to the facts disclosed by the record substantially or unreasonably impinges upon the privilege of free speech. Argument is unnecessary to demonstrate that the appellations "damned racketeer" and "damned Fascist" are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

The refusal of the state court to admit evidence of provocation and evidence bearing on the truth or falsity of the utterances, is open to no Constitutional objection. Whether the facts sought to be proved by such evidence constitute a defense to the charge, or may be shown in mitigation, are questions for the state court to determine. Our function is fulfilled by a determination that the challenged statute, on its face and as applied, does not contravene the Fourteenth Amendment.

Affirmed.

⁸ We do not have here the problem of *Lanzetta v. New Jersey*, 306 U. S. 451. Even if the interpretative gloss placed on the statute by the court below be disregarded, the statute had been previously construed as intended to preserve the public peace by punishing conduct, the direct tendency of which was to provoke the person against whom it was directed to acts of violence. *State v. Brown*, 68 N. H. 200, 38 A. 731 (1894).

Appellant need not therefore have been a prophet to understand what the statute condemned. Cf. *Herndon v. Lowry*, 301 U. S. 242. See *Nash v. United States*, 229 U. S. 373, 377.

HEINONLINE

Citation: 376 U.S. 254 1963

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Sun Apr 17 22:01:53 2011

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.

NEW YORK TIMES CO. *v.* SULLIVAN.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 39. Argued January 6, 1964.—Decided March 9, 1964.*

Respondent, an elected official in Montgomery, Alabama, brought suit in a state court alleging that he had been libeled by an advertisement in corporate petitioner's newspaper, the text of which appeared over the names of the four individual petitioners and many others. The advertisement included statements, some of which were false, about police action allegedly directed against students who participated in a civil rights demonstration and against a leader of the civil rights movement; respondent claimed the statements referred to him because his duties included supervision of the police department. The trial judge instructed the jury that such statements were "libelous per se," legal injury being implied without proof of actual damages, and that for the purpose of compensatory damages malice was presumed, so that such damages could be awarded against petitioners if the statements were found to have been published by them and to have related to respondent. As to punitive damages, the judge instructed that mere negligence was not evidence of actual malice and would not justify an award of punitive damages; he refused to instruct that actual intent to harm or recklessness had to be found before punitive damages could be awarded, or that a verdict for respondent should differentiate between compensatory and punitive damages. The jury found for respondent and the State Supreme Court affirmed. *Held*: A State cannot under the First and Fourteenth Amendments award damages to a public official for defamatory falsehood relating to his official conduct unless he proves "actual malice"—that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false. Pp. 265–292.

(a) Application by state courts of a rule of law, whether statutory or not, to award a judgment in a civil action, is "state action" under the Fourteenth Amendment. P. 265.

(b) Expression does not lose constitutional protection to which it would otherwise be entitled because it appears in the form of a paid advertisement. Pp. 265–266.

*Together with No. 40, *Abernathy et al. v. Sullivan*, also on certiorari to the same court, argued January 7, 1964.

(c) Factual error, content defamatory of official reputation, or both, are insufficient to warrant an award of damages for false statements unless "actual malice"—knowledge that statements are false or in reckless disregard of the truth—is alleged and proved. Pp. 279–283.

(d) State court judgment entered upon a general verdict which does not differentiate between punitive damages, as to which under state law actual malice must be proved, and general damages, as to which it is "presumed," precludes any determination as to the basis of the verdict and requires reversal, where presumption of malice is inconsistent with federal constitutional requirements. P. 284.

(e) The evidence was constitutionally insufficient to support the judgment for respondent, since it failed to support a finding that the statements were made with actual malice or that they related to respondent. Pp. 285–292.

273 Ala. 656, 144 So. 2d 25, reversed and remanded.

Herbert Wechsler argued the cause for petitioner in No. 39. With him on the brief were *Herbert Brownell*, *Thomas F. Daly*, *Louis M. Loeb*, *T. Eric Embry*, *Marvin E. Frankel*, *Ronald S. Diana* and *Doris Wechsler*.

William P. Rogers and *Samuel R. Pierce, Jr.* argued the cause for petitioners in No. 40. With *Mr. Pierce* on the brief were *I. H. Wachtel*, *Charles S. Conley*, *Benjamin Spiegel*, *Raymond S. Harris*, *Harry H. Wachtel*, *Joseph B. Russell*, *David N. Brainin*, *Stephen J. Jelin* and *Charles B. Markham*.

M. Roland Nachman, Jr. argued the cause for respondent in both cases. With him on the brief were *Sam Rice Baker* and *Calvin Whitesell*.

Briefs of *amici curiae*, urging reversal, were filed in No. 39 by *William P. Rogers*, *Gerald W. Siegel* and *Stanley Godofsky* for the Washington Post Company, and by *Howard Ellis*, *Keith Masters* and *Don H. Reuben* for the Tribune Company. Brief of *amici curiae*, urging reversal, was filed in both cases by *Edward S. Greenbaum*, *Harriet F. Pilpel*, *Melvin L. Wulf*, *Nanette Dembitz* and *Nancy F. Wechsler* for the American Civil Liberties Union et al.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct.

Respondent L. B. Sullivan is one of the three elected Commissioners of the City of Montgomery, Alabama. He testified that he was "Commissioner of Public Affairs and the duties are supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales." He brought this civil libel action against the four individual petitioners, who are Negroes and Alabama clergymen, and against petitioner the New York Times Company, a New York corporation which publishes the New York Times, a daily newspaper. A jury in the Circuit Court of Montgomery County awarded him damages of \$500,000, the full amount claimed, against all the petitioners, and the Supreme Court of Alabama affirmed. 273 Ala. 656, 144 So. 2d 25.

Respondent's complaint alleged that he had been libeled by statements in a full-page advertisement that was carried in the New York Times on March 29, 1960.¹ Entitled "Heed Their Rising Voices," the advertisement began by stating that "As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U. S. Constitution and the Bill of Rights." It went on to charge that "in their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . ." Succeeding

¹ A copy of the advertisement is printed in the Appendix.

paragraphs purported to illustrate the "wave of terror" by describing certain alleged events. The text concluded with an appeal for funds for three purposes: support of the student movement, "the struggle for the right-to-vote," and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery.

The text appeared over the names of 64 persons, many widely known for their activities in public affairs, religion, trade unions, and the performing arts. Below these names, and under a line reading "We in the south who are struggling daily for dignity and freedom warmly endorse this appeal," appeared the names of the four individual petitioners and of 16 other persons, all but two of whom were identified as clergymen in various Southern cities. The advertisement was signed at the bottom of the page by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," and the officers of the Committee were listed.

Of the 10 paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel. They read as follows:

Third paragraph:

"In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission."

Sixth paragraph:

"Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have

assaulted his person. They have arrested him seven times—for 'speeding,' 'loitering' and similar 'offenses.' And now they have charged him with 'perjury'—a *felony* under which they could imprison him for *ten years*. . . ."

Although neither of these statements mentions respondent by name, he contended that the word "police" in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department, so that he was being accused of "ringing" the campus with police. He further claimed that the paragraph would be read as imputing to the police, and hence to him, the padlocking of the dining hall in order to starve the students into submission.² As to the sixth paragraph, he contended that since arrests are ordinarily made by the police, the statement "They have arrested [Dr. King] seven times" would be read as referring to him; he further contended that the "They" who did the arresting would be equated with the "They" who committed the other described acts and with the "Southern violators." Thus, he argued, the paragraph would be read as accusing the Montgomery police, and hence him, of answering Dr. King's protests with "intimidation and violence," bombing his home, assaulting his person, and charging him with perjury. Respondent and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner.

It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro students staged a demonstration on the State Capitol steps, they sang the National Anthem and not "My

² Respondent did not consider the charge of expelling the students to be applicable to him, since "that responsibility rests with the State Department of Education."

Country, 'Tis of Thee." Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. Not the entire student body, but most of it, had protested the expulsion, not by refusing to register, but by boycotting classes on a single day; virtually all the students did register for the ensuing semester. The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets. Although the police were deployed near the campus in large numbers on three occasions, they did not at any time "ring" the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied. Dr. King had not been arrested seven times, but only four; and although he claimed to have been assaulted some years earlier in connection with his arrest for loitering outside a courtroom, one of the officers who made the arrest denied that there was such an assault.

On the premise that the charges in the sixth paragraph could be read as referring to him, respondent was allowed to prove that he had not participated in the events described. Although Dr. King's home had in fact been bombed twice when his wife and child were there, both of these occasions antedated respondent's tenure as Commissioner, and the police were not only not implicated in the bombings, but had made every effort to apprehend those who were. Three of Dr. King's four arrests took place before respondent became Commissioner. Although Dr. King had in fact been indicted (he was subsequently acquitted) on two counts of perjury, each of which carried a possible five-year sentence, respondent had nothing to do with procuring the indictment.

Respondent made no effort to prove that he suffered actual pecuniary loss as a result of the alleged libel.³ One of his witnesses, a former employer, testified that if he had believed the statements, he doubted whether he "would want to be associated with anybody who would be a party to such things that are stated in that ad," and that he would not re-employ respondent if he believed "that he allowed the Police Department to do the things that the paper say he did." But neither this witness nor any of the others testified that he had actually believed the statements in their supposed reference to respondent.

The cost of the advertisement was approximately \$4800, and it was published by the Times upon an order from a New York advertising agency acting for the signatory Committee. The agency submitted the advertisement with a letter from A. Philip Randolph, Chairman of the Committee, certifying that the persons whose names appeared on the advertisement had given their permission. Mr. Randolph was known to the Times' Advertising Acceptability Department as a responsible person, and in accepting the letter as sufficient proof of authorization it followed its established practice. There was testimony that the copy of the advertisement which accompanied the letter listed only the 64 names appearing under the text, and that the statement, "We in the south . . . warmly endorse this appeal," and the list of names thereunder, which included those of the individual petitioners, were subsequently added when the first proof of the advertisement was received. Each of the individual petitioners testified that he had not authorized the use of his name, and that he had been unaware of its use until receipt of respondent's demand for a retraction. The manager of the Advertising Ac-

³ Approximately 394 copies of the edition of the Times containing the advertisement were circulated in Alabama. Of these, about 35 copies were distributed in Montgomery County. The total circulation of the Times for that day was approximately 650,000 copies.

ceptability Department testified that he had approved the advertisement for publication because he knew nothing to cause him to believe that anything in it was false, and because it bore the endorsement of "a number of people who are well known and whose reputation" he "had no reason to question." Neither he nor anyone else at the Times made an effort to confirm the accuracy of the advertisement, either by checking it against recent Times news stories relating to some of the described events or by any other means.

Alabama law denies a public officer recovery of punitive damages in a libel action brought on account of a publication concerning his official conduct unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply. Alabama Code, Tit. 7, § 914. Respondent served such a demand upon each of the petitioners. None of the individual petitioners responded to the demand, primarily because each took the position that he had not authorized the use of his name on the advertisement and therefore had not published the statements that respondent alleged had libeled him. The Times did not publish a retraction in response to the demand, but wrote respondent a letter stating, among other things, that "we . . . are somewhat puzzled as to how you think the statements in any way reflect on you," and "you might, if you desire, let us know in what respect you claim that the statements in the advertisement reflect on you." Respondent filed this suit a few days later without answering the letter. The Times did, however, subsequently publish a retraction of the advertisement upon the demand of Governor John Patterson of Alabama, who asserted that the publication charged him with "grave misconduct and . . . improper actions and omissions as Governor of Alabama and Ex-Officio Chairman of the State Board of Education of Alabama." When asked to explain why there had been a retraction for the Governor but not for respondent, the

Secretary of the Times testified: "We did that because we didn't want anything that was published by The Times to be a reflection on the State of Alabama and the Governor was, as far as we could see, the embodiment of the State of Alabama and the proper representative of the State and, furthermore, we had by that time learned more of the actual facts which the ad purported to recite and, finally, the ad did refer to the action of the State authorities and the Board of Education presumably of which the Governor is the ex-officio chairman" On the other hand, he testified that he did not think that "any of the language in there referred to Mr. Sullivan."

The trial judge submitted the case to the jury under instructions that the statements in the advertisement were "libelous *per se*" and were not privileged, so that petitioners might be held liable if the jury found that they had published the advertisement and that the statements were made "of and concerning" respondent. The jury was instructed that, because the statements were libelous *per se*, "the law . . . implies legal injury from the bare fact of publication itself," "falsity and malice are presumed," "general damages need not be alleged or proved but are presumed," and "punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown." An award of punitive damages—as distinguished from "general" damages, which are compensatory in nature—apparently requires proof of actual malice under Alabama law, and the judge charged that "mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages." He refused to charge, however, that the jury must be "convinced" of malice, in the sense of "actual intent" to harm or "gross negligence and recklessness," to make such an award, and he also refused to require that a verdict for respondent differentiate between compensatory and punitive damages. The judge rejected petitioners' con-

tention that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments.

In affirming the judgment, the Supreme Court of Alabama sustained the trial judge's rulings and instructions in all respects. 273 Ala. 656, 144 So. 2d 25. It held that "where the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tend to bring the individual into public contempt," they are "libelous per se"; that "the matter complained of is, under the above doctrine, libelous per se, if it was published of and concerning the plaintiff"; and that it was actionable without "proof of pecuniary injury . . . , such injury being implied." *Id.*, at 673, 676, 144 So. 2d, at 37, 41. It approved the trial court's ruling that the jury could find the statements to have been made "of and concerning" respondent, stating: "We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body." *Id.*, at 674-675, 144 So. 2d, at 39. In sustaining the trial court's determination that the verdict was not excessive, the court said that malice could be inferred from the Times' "irresponsibility" in printing the advertisement while "the Times in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement"; from the Times' failure to retract for respondent while retracting for the Governor, whereas the falsity of some of the allegations was then known to the Times and "the matter contained in the advertisement was equally false as to both parties"; and from the testimony of the Times' Secretary that,

apart from the statement that the dining hall was padlocked, he thought the two paragraphs were "substantially correct." *Id.*, at 686-687, 144 So. 2d, at 50-51. The court reaffirmed a statement in an earlier opinion that "There is no legal measure of damages in cases of this character." *Id.*, at 686, 144 So. 2d, at 50. It rejected petitioners' constitutional contentions with the brief statements that "The First Amendment of the U. S. Constitution does not protect libelous publications" and "The Fourteenth Amendment is directed against State action and not private action." *Id.*, at 676, 144 So. 2d, at 40.

Because of the importance of the constitutional issues involved, we granted the separate petitions for certiorari of the individual petitioners and of the Times. 371 U.S. 946. We reverse the judgment. We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct.⁴ We

⁴ Since we sustain the contentions of all the petitioners under the First Amendment's guarantees of freedom of speech and of the press as applied to the States by the Fourteenth Amendment, we do not decide the questions presented by the other claims of violation of the Fourteenth Amendment. The individual petitioners contend that the judgment against them offends the Due Process Clause because there was no evidence to show that they had published or authorized the publication of the alleged libel, and that the Due Process and Equal Protection Clauses were violated by racial segregation and racial bias in the courtroom. The Times contends that the assumption of jurisdiction over its corporate person by the Alabama courts overreaches the territorial limits of the Due Process Clause. The latter claim is foreclosed from our review by the ruling of the Alabama courts that the Times entered a general appearance in the action and thus waived its jurisdictional objection; we cannot say that this ruling lacks "fair or substantial support" in prior Alabama decisions. See *Thompson v. Wilson*, 224 Ala. 299, 140 So. 439 (1932); compare *N. A. A. C. P. v. Alabama*, 357 U. S. 449, 454-458.

further hold that under the proper safeguards the evidence presented in this case is constitutionally insufficient to support the judgment for respondent.

I.

We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court—that “The Fourteenth Amendment is directed against State action and not private action.” That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. See, *e. g.*, Alabama Code, Tit. 7, §§ 908–917. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised. See *Ex parte Virginia*, 100 U. S. 339, 346–347; *American Federation of Labor v. Swing*, 312 U. S. 321.

The second contention is that the constitutional guarantees of freedom of speech and of the press are inapplicable here, at least so far as the Times is concerned, because the allegedly libelous statements were published as part of a paid, “commercial” advertisement. The argument relies on *Valentine v. Chrestensen*, 316 U. S. 52, where the Court held that a city ordinance forbidding street distribution of commercial and business advertising matter did not abridge the First Amendment freedoms, even as applied to a handbill having a commercial message on one side but a protest against certain official action on the other. The reliance is wholly misplaced. The Court in *Chrestensen* reaffirmed the constitutional protection for “the freedom of communicating

information and disseminating opinion"; its holding was based upon the factual conclusions that the handbill was "purely commercial advertising" and that the protest against official action had been added only to evade the ordinance.

The publication here was not a "commercial" advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern. See *N. A. A. C. P. v. Button*, 371 U. S. 415, 435. That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. *Smith v. California*, 361 U. S. 147, 150; cf. *Bantam Books, Inc., v. Sullivan*, 372 U. S. 58, 64, n. 6. Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. Cf. *Lovell v. Griffin*, 303 U. S. 444, 452; *Schneider v. State*, 308 U. S. 147, 164. The effect would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U. S. 1, 20. To avoid placing such a handicap upon the freedoms of expression, we hold that if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement.⁵

⁵ See American Law Institute, Restatement of Torts, § 593, Comment b (1938).

II.

Under Alabama law as applied in this case, a publication is “libelous per se” if the words “tend to injure a person . . . in his reputation” or to “bring [him] into public contempt”; the trial court stated that the standard was met if the words are such as to “injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust” The jury must find that the words were published “of and concerning” the plaintiff, but where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge. Once “libel per se” has been established, the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars. *Alabama Ride Co. v. Vance*, 235 Ala. 263, 178 So. 438 (1938); *Johnson Publishing Co. v. Davis*, 271 Ala. 474, 494–495, 124 So. 2d 441, 457–458 (1960). His privilege of “fair comment” for expressions of opinion depends on the truth of the facts upon which the comment is based. *Parsons v. Age-Herald Publishing Co.*, 181 Ala. 439, 450, 61 So. 345, 350 (1913). Unless he can discharge the burden of proving truth, general damages are presumed, and may be awarded without proof of pecuniary injury. A showing of actual malice is apparently a prerequisite to recovery of punitive damages, and the defendant may in any event forestall a punitive award by a retraction meeting the statutory requirements. Good motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight. *Johnson Publishing Co. v. Davis*, *supra*, 271 Ala., at 495, 124 So. 2d, at 458.

The question before us is whether this rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments.

Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications.⁶ Those statements do not foreclose our inquiry here. None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials. The dictum in *Pennekamp v. Florida*, 328 U. S. 331, 348-349, that "when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants," implied no view as to what remedy might constitutionally be afforded to public officials. In *Beauharnais v. Illinois*, 343 U. S. 250, the Court sustained an Illinois criminal libel statute as applied to a publication held to be both defamatory of a racial group and "liable to cause violence and disorder." But the Court was careful to note that it "retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel"; for "public men, are, as it were, public property," and "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." *Id.*, at 263-264, and n. 18. In the only previous case that did present the question of constitutional limitations upon the power to award damages for libel of a public official, the Court was equally divided and the question was not decided. *Schenectady Union Pub. Co. v. Sweeney*, 316 U. S. 642.

⁶ *Konigsberg v. State Bar of California*, 366 U. S. 36, 49, and n. 10; *Times Film Corp. v. City of Chicago*, 365 U. S. 43, 48; *Roth v. United States*, 354 U. S. 476, 486-487; *Beauharnais v. Illinois*, 343 U. S. 250, 266; *Pennekamp v. Florida*, 328 U. S. 331, 348-349; *Chaplinsky v. New Hampshire*, 315 U. S. 568, 572; *Near v. Minnesota*, 283 U. S. 697, 715.

In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law. *N. A. A. C. P. v. Button*, 371 U. S. 415, 429. Like insurrection,⁷ contempt,⁸ advocacy of unlawful acts,⁹ breach of the peace,¹⁰ obscenity,¹¹ solicitation of legal business,¹² and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U. S. 476, 484. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U. S. 359, 369. "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," *Bridges v. California*, 314 U. S. 252, 270, and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion." *N. A. A. C. P. v. Button*, 371 U. S. 415, 429.

⁷ *Herndon v. Lowry*, 301 U. S. 242.

⁸ *Bridges v. California*, 314 U. S. 252; *Pennekamp v. Florida*, 328 U. S. 331.

⁹ *De Jonge v. Oregon*, 299 U. S. 353.

¹⁰ *Edwards v. South Carolina*, 372 U. S. 229.

¹¹ *Roth v. United States*, 354 U. S. 476.

¹² *N. A. A. C. P. v. Button*, 371 U. S. 415.

The First Amendment, said Judge Learned Hand, “pre-supposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.” *United States v. Associated Press*, 52 F. Supp. 362, 372 (D. C. S. D. N. Y. 1943). Mr. Justice Brandeis, in his concurring opinion in *Whitney v. California*, 274 U. S. 357, 375–376, gave the principle its classic formulation:

“Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.”

Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. See *Terminiello v. Chicago*, 337 U. S. 1, 4; *De Jonge v. Oregon*, 299 U. S. 353,

365. The present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent.

Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker. Cf. *Speiser v. Randall*, 357 U. S. 513, 525–526. The constitutional protection does not turn upon “the truth, popularity, or social utility of the ideas and beliefs which are offered.” *N. A. A. C. P. v. Button*, 371 U. S. 415, 445. As Madison said, “Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.” 4 Elliot’s Debates on the Federal Constitution (1876), p. 571. In *Cantwell v. Connecticut*, 310 U. S. 296, 310, the Court declared:

“In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.”

That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of ex-

pression are to have the "breathing space" that they "need . . . to survive," *N. A. A. C. P. v. Button*, 371 U. S. 415, 433, was also recognized by the Court of Appeals for the District of Columbia Circuit in *Sweeney v. Patterson*, 76 U. S. App. D. C. 23, 24, 128 F. 2d 457, 458 (1942), cert. denied, 317 U. S. 678. Judge Edgerton spoke for a unanimous court which affirmed the dismissal of a Congressman's libel suit based upon a newspaper article charging him with anti-Semitism in opposing a judicial appointment. He said:

"Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. . . . The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors of fact, particularly in regard to a man's mental states and processes, are inevitable. . . . Whatever is added to the field of libel is taken from the field of free debate." ¹³

Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error. Where judicial officers are involved, this Court has held that concern for the dignity and

¹³ See also Mill, *On Liberty* (Oxford: Blackwell, 1947), at 47:

". . . [T]o argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion . . . all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that it is rarely possible, on adequate grounds, conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct."

reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. *Bridges v. California*, 314 U. S. 252. This is true even though the utterance contains "half-truths" and "misinformation." *Pennekamp v. Florida*, 328 U. S. 331, 342, 343, n. 5, 345. Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. See also *Craig v. Harney*, 331 U. S. 367; *Wood v. Georgia*, 370 U. S. 375. If judges are to be treated as "men of fortitude, able to thrive in a hardy climate," *Craig v. Harney*, *supra*, 331 U. S., at 376, surely the same must be true of other government officials, such as elected city commissioners.¹⁴ Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate. This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 596, which first crystallized a national awareness of the central meaning of the First Amendment. See Levy, *Legacy of Suppression* (1960), at 258 *et seq.*; Smith, *Freedom's Fetters* (1956), at 426, 431, and *passim*. That statute made it a crime, punishable by a \$5,000 fine and five years in prison, "if any person shall write, print, utter or publish . . . any false, scandalous and malicious

¹⁴ The climate in which public officials operate, especially during a political campaign, has been described by one commentator in the following terms: "Charges of gross incompetence, disregard of the public interest, communist sympathies, and the like usually have filled the air; and hints of bribery, embezzlement, and other criminal conduct are not infrequent." Noel, *Defamation of Public Officers and Candidates*, 49 Col. L. Rev. 875 (1949).

For a similar description written 60 years earlier, see Chase, *Criticism of Public Officers and Candidates for Office*, 23 Am. L. Rev. 346 (1889).

writing or writings against the government of the United States, or either house of the Congress . . . , or the President . . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States.” The Act allowed the defendant the defense of truth, and provided that the jury were to be judges both of the law and the facts. Despite these qualifications, the Act was vigorously condemned as unconstitutional in an attack joined in by Jefferson and Madison. In the famous Virginia Resolutions of 1798, the General Assembly of Virginia resolved that it

“doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the ‘Alien and Sedition Acts,’ passed at the last session of Congress [The Sedition Act] exercises . . . a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto—a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.” 4 Elliot’s Debates, *supra*, pp. 553–554.

Madison prepared the Report in support of the protest. His premise was that the Constitution created a form of government under which “The people, not the government, possess the absolute sovereignty.” The structure of the government dispersed power in reflection of the people’s distrust of concentrated power, and of power itself at all levels. This form of government was “altogether different” from the British form, under which the Crown was sovereign and the people were subjects. “Is

it not natural and necessary, under such different circumstances," he asked, "that a different degree of freedom in the use of the press should be contemplated?" *Id.*, pp. 569-570. Earlier, in a debate in the House of Representatives, Madison had said: "If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people." 4 Annals of Congress, p. 934 (1794). Of the exercise of that power by the press, his Report said: "In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands" 4 Elliot's Debates, *supra*, p. 570. The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government.¹⁵

¹⁵ The Report on the Virginia Resolutions further stated:

"[I]t is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; . . . which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it, by free animadversions on their characters and conduct. Nor can there be a doubt . . . that a government thus intrenched in penal statutes against the just and natural effects of a culpable administration, will easily evade the responsibility which is essential to a faithful discharge of its duty.

"Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." 4 Elliot's Debates, *supra*, p. 575.

Although the Sedition Act was never tested in this Court,¹⁶ the attack upon its validity has carried the day in the court of history. Fines levied in its prosecution were repaid by Act of Congress on the ground that it was unconstitutional. See, *e. g.*, Act of July 4, 1840, c. 45, 6 Stat. 802, accompanied by H. R. Rep. No. 86, 26th Cong., 1st Sess. (1840). Calhoun, reporting to the Senate on February 4, 1836, assumed that its invalidity was a matter "which no one now doubts." Report with Senate bill No. 122, 24th Cong., 1st Sess., p. 3. Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and remitted their fines, stating: "I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." Letter to Mrs. Adams, July 22, 1804, 4 Jefferson's Works (Washington ed.), pp. 555, 556. The invalidity of the Act has also been assumed by Justices of this Court. See Holmes, J., dissenting and joined by Brandeis, J., in *Abrams v. United States*, 250 U.S. 616, 630; Jackson, J., dissenting in *Beauharnais v. Illinois*, 343 U.S. 250, 288-289; Douglas, *The Right of the People* (1958), p. 47. See also Cooley, *Constitutional Limitations* (8th ed., Carrington, 1927), pp. 899-900; Chafee, *Free Speech in the United States* (1942), pp. 27-28. These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.

There is no force in respondent's argument that the constitutional limitations implicit in the history of the Sedition Act apply only to Congress and not to the States. It is true that the First Amendment was originally addressed only to action by the Federal Government, and

¹⁶ The Act expired by its terms in 1801.

that Jefferson, for one, while denying the power of Congress "to controul the freedom of the press," recognized such a power in the States. See the 1804 Letter to Abigail Adams quoted in *Dennis v. United States*, 341 U. S. 494, 522, n. 4 (concurring opinion). But this distinction was eliminated with the adoption of the Fourteenth Amendment and the application to the States of the First Amendment's restrictions. See, e. g., *Gitlow v. New York*, 268 U. S. 652, 666; *Schneider v. State*, 308 U. S. 147, 160; *Bridges v. California*, 314 U. S. 252, 268; *Edwards v. South Carolina*, 372 U. S. 229, 235.

What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.¹⁷ The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. See *City of Chicago v. Tribune Co.*, 307 Ill. 595, 607, 139 N. E. 86, 90 (1923). Alabama, for example, has a criminal libel law which subjects to prosecution "any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude," and which allows as punishment upon conviction a fine not exceeding \$500 and a prison sentence of six months. Alabama Code, Tit. 14, § 350. Presumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act.

¹⁷ Cf. *Farmers Union v. WDAY*, 360 U. S. 525, 535.

720-509 O-65-22

And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication.¹⁸ Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." *Bantam Books, Inc., v. Sullivan*, 372 U. S. 58, 70.

The state rule of law is not saved by its allowance of the defense of truth. A defense for erroneous statements honestly made is no less essential here than was the requirement of proof of guilty knowledge which, in *Smith v. California*, 361 U. S. 147, we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale. We said:

"For if the bookseller is criminally liable without knowledge of the contents, . . . he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . . And the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. . . . [H]is timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitu-

¹⁸ The Times states that four other libel suits based on the advertisement have been filed against it by others who have served as Montgomery City Commissioners and by the Governor of Alabama; that another \$500,000 verdict has been awarded in the only one of these cases that has yet gone to trial; and that the damages sought in the other three total \$2,000,000.

tionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded." (361 U. S. 147, 153-154.)

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.¹⁹ Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. See, *e. g.*, *Post Publishing Co. v. Hallam*, 59 F. 530, 540 (C. A. 6th Cir. 1893); see also Noel, *Defamation of Public Officers and Candidates*, 49 Col. L. Rev. 875, 892 (1949). Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." *Speiser v. Randall*, *supra*, 357 U. S., at 526. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made

¹⁹ Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about "the clearer perception and livelier impression of truth, produced by its collision with error." Mill, *On Liberty* (Oxford: Blackwell, 1947), at 15; see also Milton, *Areopagitica*, in *Prose Works* (Yale, 1959), Vol. II, at 561.

with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. An oft-cited statement of a like rule, which has been adopted by a number of state courts,²⁰ is found in the Kansas case of *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908). The State Attorney General, a candidate for re-election and a member of the commission charged with the management and control of the state school fund, sued a newspaper publisher for alleged libel in an article purporting to state facts relating to his official conduct in connection with a school-fund transaction. The defendant pleaded privilege and the trial judge, over the plaintiff's objection, instructed the jury that

"where an article is published and circulated among voters for the sole purpose of giving what the de-

²⁰ *E. g.*, *Ponder v. Cobb*, 257 N. C. 281, 299, 126 S. E. 2d 67, 80 (1962); *Lawrence v. Fox*, 357 Mich. 134, 146, 97 N. W. 2d 719, 725 (1959); *Stice v. Beacon Newspaper Corp.*, 185 Kan. 61, 65-67, 340 P. 2d 396, 400-401 (1959); *Bailey v. Charleston Mail Assn.*, 126 W. Va. 292, 307, 27 S. E. 2d 837, 844 (1943); *Salinger v. Cowles*, 195 Iowa 873, 889, 191 N. W. 167, 174 (1922); *Snively v. Record Publishing Co.*, 185 Cal. 565, 571-576, 198 P. 1 (1921); *McLean v. Merriman*, 42 S. D. 394, 175 N. W. 878 (1920). Applying the same rule to candidates for public office, see, *e. g.*, *Phoenix Newspapers v. Choisser*, 82 Ariz. 271, 276-277, 312 P. 2d 150, 154 (1957); *Friedell v. Blakely Printing Co.*, 163 Minn. 226, 230, 203 N. W. 974, 975 (1925). And see *Chagnon v. Union-Leader Corp.*, 103 N. H. 426, 438, 174 A. 2d 825, 833 (1961), cert. denied, 369 U. S. 830.

The consensus of scholarly opinion apparently favors the rule that is here adopted. *E. g.*, 1 Harper and James, *Torts*, § 5.26, at 449-450 (1956); Noel, *Defamation of Public Officers and Candidates*, 49 Col. L. Rev. 875, 891-895, 897, 903 (1949); Hallen, *Fair Comment*, 8 Tex. L. Rev. 41, 61 (1929); Smith, *Charges Against Candidates*, 18 Mich. L. Rev. 1, 115 (1919); Chase, *Criticism of Public Officers and Candidates for Office*, 23 Am. L. Rev. 346, 367-371 (1889); Cooley, *Constitutional Limitations* (7th ed., Lane, 1903), at 604, 616-628. But see, *e. g.*, American Law Institute, *Restatement of Torts*, § 598, Comment a (1938) (reversing the position taken in Tentative Draft 13, § 1041 (2) (1936)); Veeder, *Freedom of Public Discussion*, 23 Harv. L. Rev. 413, 419 (1910).

fendant believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently, and the whole thing is done in good faith and without malice, the article is privileged, although the principal matters contained in the article may be untrue in fact and derogatory to the character of the plaintiff; and in such a case the burden is on the plaintiff to show actual malice in the publication of the article."

In answer to a special question, the jury found that the plaintiff had not proved actual malice, and a general verdict was returned for the defendant. On appeal the Supreme Court of Kansas, in an opinion by Justice Burch, reasoned as follows (78 Kan., at 724, 98 P., at 286):

"It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great, and the chance of injury to private character so small, that such discussion must be privileged."

The court thus sustained the trial court's instruction as a correct statement of the law, saying:

"In such a case the occasion gives rise to a privilege, qualified to this extent: any one claiming to be defamed by the communication must show actual malice or go remediless. This privilege extends to a great variety of subjects, and includes matters of

public concern, public men, and candidates for office.”
78 Kan., at 723, 98 P., at 285.

Such a privilege for criticism of official conduct²¹ is appropriately analogous to the protection accorded a public official when *he* is sued for libel by a private citizen. In *Barr v. Matteo*, 360 U. S. 564, 575, this Court held the utterance of a federal official to be absolutely privileged if made “within the outer perimeter” of his duties. The States accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and qualify the privilege they enjoy.²² But all hold that all officials are protected unless actual malice can be proved. The reason for the official privilege is said to be that the threat of damage suits would otherwise “inhibit the fearless, vigorous, and effective administration of policies of government” and “dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.” *Barr v. Matteo, supra*, 360 U. S., at 571. Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official’s duty to administer. See *Whitney v. California*, 274 U. S. 357, 375 (concurring opinion of Mr. Justice Brandeis), quoted *supra*, p. 270. As Madison said, see *supra*, p. 275, “the censorial power is in the people over the Government, and not in the Government over the people.” It would give public servants an unjustified preference over the public they serve, if critics of official conduct

²¹ The privilege immunizing honest misstatements of fact is often referred to as a “conditional” privilege to distinguish it from the “absolute” privilege recognized in judicial, legislative, administrative and executive proceedings. See, *e. g.*, Prosser, Torts (2d ed., 1955), § 95.

²² See 1 Harper and James, Torts, § 5.23, at 429-430 (1956); Prosser, Torts (2d ed., 1955), at 612-613; American Law Institute, Restatement of Torts (1938), § 591.

did not have a fair equivalent of the immunity granted to the officials themselves.

We conclude that such a privilege is required by the First and Fourteenth Amendments.

III.

We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action,²³ the rule requiring proof of actual malice is applicable. While Alabama law apparently requires proof of actual malice for an award of punitive damages,²⁴ where general damages are concerned malice is "presumed." Such a presumption is inconsistent

²³ We have no occasion here to determine how far down into the lower ranks of government employees the "public official" designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Cf. *Barr v. Matteo*, 360 U. S. 564, 573-575. Nor need we here determine the boundaries of the "official conduct" concept. It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official, and that the allegations in the advertisement concerned what was allegedly his official conduct as Commissioner in charge of the Police Department. As to the statements alleging the assaulting of Dr. King and the bombing of his home, it is immaterial that they might not be considered to involve respondent's official conduct if he himself had been accused of perpetrating the assault and the bombing. Respondent does not claim that the statements charged him personally with these acts; his contention is that the advertisement connects him with them only in his official capacity as the Commissioner supervising the police, on the theory that the police might be equated with the "They" who did the bombing and assaulting. Thus, if these allegations can be read as referring to respondent at all, they must be read as describing his performance of his official duties.

²⁴ *Johnson Publishing Co. v. Davis*, 271 Ala. 474, 487, 124 So. 2d 441, 450 (1960). Thus, the trial judge here instructed the jury that "mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages in an action for libel." [*Footnote 24 continued on p. 284*]

with the federal rule. "The power to create presumptions is not a means of escape from constitutional restrictions," *Bailey v. Alabama*, 219 U. S. 219, 239; "the showing of malice required for the forfeiture of the privilege is not presumed but is a matter for proof by the plaintiff" *Lawrence v. Fox*, 357 Mich. 134, 146, 97 N. W. 2d 719, 725 (1959).²⁵ Since the trial judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned. Because of this uncertainty, the judgment must be reversed and the case remanded. *Stromberg v. California*, 283 U. S. 359, 367-368; *Williams v. North Carolina*, 317 U. S. 287, 291-292; see *Yates v. United States*, 354 U. S. 298, 311-312; *Cramer v. United States*, 325 U. S. 1, 36, n. 45.

Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to deter-

The court refused, however, to give the following instruction which had been requested by the Times:

"I charge you . . . that punitive damages, as the name indicates, are designed to punish the defendant, the New York Times Company, a corporation, and the other defendants in this case, . . . and I further charge you that such punitive damages may be awarded only in the event that you, the jury, are convinced by a fair preponderance of the evidence that the defendant . . . was motivated by personal ill will, that is actual intent to do the plaintiff harm, or that the defendant . . . was guilty of gross negligence and recklessness and not of just ordinary negligence or carelessness in publishing the matter complained of so as to indicate a wanton disregard of plaintiff's rights."

The trial court's error in failing to require any finding of actual malice for an award of general damages makes it unnecessary for us to consider the sufficiency under the federal standard of the instructions regarding actual malice that were given as to punitive damages.

²⁵ Accord, *Coleman v. MacLennan*, *supra*, 78 Kan., at 741, 98 P., at 292; *Gough v. Tribune-Journal Co.*, 75 Idaho 502, 510, 275 P. 2d 663, 668 (1954).

mine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." *Speiser v. Randall*, 357 U. S. 513, 525. In cases where that line must be drawn, the rule is that we "examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." *Pennekamp v. Florida*, 328 U. S. 331, 335; see also *One, Inc., v. Olesen*, 355 U. S. 371; *Sunshine Book Co. v. Summerfield*, 355 U. S. 372. We must "make an independent examination of the whole record," *Edwards v. South Carolina*, 372 U. S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.²⁶

Applying these standards, we consider that the proof presented to show actual malice lacks the convincing

²⁶ The Seventh Amendment does not, as respondent contends, preclude such an examination by this Court. That Amendment, providing that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law," is applicable to state cases coming here. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 242-243; cf. *The Justices v. Murray*, 9 Wall. 274. But its ban on re-examination of facts does not preclude us from determining whether governing rules of federal law have been properly applied to the facts. "[T]his Court will review the finding of facts by a State court . . . where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." *Fiske v. Kansas*, 274 U. S. 380, 385-386. See also *Haynes v. Washington*, 373 U. S. 503, 515-516.

clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law. The case of the individual petitioners requires little discussion. Even assuming that they could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support.

As to the Times, we similarly conclude that the facts do not support a finding of actual malice. The statement by the Times' Secretary that, apart from the padlocking allegation, he thought the advertisement was "substantially correct," affords no constitutional warrant for the Alabama Supreme Court's conclusion that it was a "cavalier ignoring of the falsity of the advertisement [from which] the jury could not have but been impressed with the bad faith of The Times, and its maliciousness inferable therefrom." The statement does not indicate malice at the time of the publication; even if the advertisement was not "substantially correct"—although respondent's own proofs tend to show that it was—that opinion was at least a reasonable one, and there was no evidence to impeach the witness' good faith in holding it. The Times' failure to retract upon respondent's demand, although it later retracted upon the demand of Governor Patterson, is likewise not adequate evidence of malice for constitutional purposes. Whether or not a failure to retract may ever constitute such evidence, there are two reasons why it does not here. *First*, the letter written by the Times reflected a reasonable doubt on its part as to whether the advertisement could reasonably be taken to refer to respondent at all. *Second*, it was not a final refusal, since it asked for an explanation on this point—a request that respondent chose to ignore. Nor does the retraction upon the demand of the Governor supply the

necessary proof. It may be doubted that a failure to retract which is not itself evidence of malice can retroactively become such by virtue of a retraction subsequently made to another party. But in any event that did not happen here, since the explanation given by the Times' Secretary for the distinction drawn between respondent and the Governor was a reasonable one, the good faith of which was not impeached.

Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times "knew" the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement. With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, known to them as a responsible individual, certifying that the use of the names was authorized. There was testimony that the persons handling the advertisement saw nothing in it that would render it unacceptable under the Times' policy of rejecting advertisements containing "attacks of a personal character";²⁷ their failure to reject it on this ground was not unreasonable. We think

²⁷ The Times has set forth in a booklet its "Advertising Acceptability Standards." Listed among the classes of advertising that the newspaper does not accept are advertisements that are "fraudulent or deceptive," that are "ambiguous in wording and . . . may mislead," and that contain "attacks of a personal character." In replying to respondent's interrogatories before the trial, the Secretary of the Times stated that "as the advertisement made no attacks of a personal character upon any individual and otherwise met the advertising acceptability standards promulgated," it had been approved for publication.

the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice. Cf. *Charles Parker Co. v. Silver City Crystal Co.*, 142 Conn. 605, 618, 116 A. 2d 440, 446 (1955); *Phoenix Newspapers, Inc., v. Choisser*, 82 Ariz. 271, 277-278, 312 P. 2d 150, 154-155 (1957).

We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made "of and concerning" respondent. Respondent relies on the words of the advertisement and the testimony of six witnesses to establish a connection between it and himself. Thus, in his brief to this Court, he states:

"The reference to respondent as police commissioner is clear from the ad. In addition, the jury heard the testimony of a newspaper editor . . . ; a real estate and insurance man . . . ; the sales manager of a men's clothing store . . . ; a food equipment man . . . ; a service station operator . . . ; and the operator of a truck line for whom respondent had formerly worked Each of these witnesses stated that he associated the statements with respondent" (Citations to record omitted.)

There was no reference to respondent in the advertisement, either by name or official position. A number of the allegedly libelous statements—the charges that the dining hall was padlocked and that Dr. King's home was bombed, his person assaulted, and a perjury prosecution instituted against him—did not even concern the police; despite the ingenuity of the arguments which would attach this significance to the word "They," it is plain that these statements could not reasonably be read as accusing respondent of personal involvement in the acts

in question. The statements upon which respondent principally relies as referring to him are the two allegations that did concern the police or police functions: that "truckloads of police . . . ringed the Alabama State College Campus" after the demonstration on the State Capitol steps, and that Dr. King had been "arrested . . . seven times." These statements were false only in that the police had been "deployed near" the campus but had not actually "ringed" it and had not gone there in connection with the State Capitol demonstration, and in that Dr. King had been arrested only four times. The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems, but we need not consider them here. Although the statements may be taken as referring to the police, they did not on their face make even an oblique reference to respondent as an individual. Support for the asserted reference must, therefore, be sought in the testimony of respondent's witnesses. But none of them suggested any basis for the belief that respondent himself was attacked in the advertisement beyond the bare fact that he was in overall charge of the Police Department and thus bore official responsibility for police conduct; to the extent that some of the witnesses thought respondent to have been charged with ordering or approving the conduct or otherwise being personally involved in it, they based this notion not on any statements in the advertisement, and not on any evidence that he had in fact been so involved, but solely on the unsupported assumption that, because of his official position, he must have been.²⁸ This reliance on the bare

²⁸ Respondent's own testimony was that "as Commissioner of Public Affairs it is part of my duty to supervise the Police Department and I certainly feel like it [a statement] is associated with me when it describes police activities." He thought that "by virtue of being

fact of respondent's official position ²⁹ was made explicit by the Supreme Court of Alabama. That court, in holding that the trial court "did not err in overruling the demurrer [of the Times] in the aspect that the libelous

Police Commissioner and Commissioner of Public Affairs," he was charged with "any activity on the part of the Police Department." "When it describes police action, certainly I feel it reflects on me as an individual." He added that "It is my feeling that it reflects not only on me but on the other Commissioners and the community."

Grover C. Hall testified that to him the third paragraph of the advertisement called to mind "the City government—the Commissioners," and that "now that you ask it I would naturally think a little more about the police Commissioner because his responsibility is exclusively with the constabulary." It was "the phrase about starvation" that led to the association; "the other didn't hit me with any particular force."

Arnold D. Blackwell testified that the third paragraph was associated in his mind with "the Police Commissioner and the police force. The people on the police force." If he had believed the statement about the padlocking of the dining hall, he would have thought "that the people on our police force or the heads of our police force were acting without their jurisdiction and would not be competent for the position." "I would assume that the Commissioner had ordered the police force to do that and therefore it would be his responsibility."

Harry W. Kaminsky associated the statement about "truckloads of police" with respondent "because he is the Police Commissioner." He thought that the reference to arrests in the sixth paragraph "implicates the Police Department, I think, or the authorities that would do that—arrest folks for speeding and loitering and such as that." Asked whether he would associate with respondent a newspaper report that the police had "beat somebody up or assaulted them on the streets of Montgomery," he replied: "I still say he is the Police Commissioner and those men are working directly under him and therefore I would think that he would have something to do with it." In general, he said, "I look at Mr. Sullivan when I see the Police Department."

H. M. Price, Sr., testified that he associated the first sentence of the third paragraph with respondent because: "I would just automatically consider that the Police Commissioner in Montgomery

[Footnote 29 is on p. 291]

matter was not of and concerning the [plaintiff,]" based its ruling on the proposition that:

"We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body." 273 Ala., at 674-675, 144 So. 2d, at 39.

This proposition has disquieting implications for criticism of governmental conduct. For good reason, "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." *City of Chicago v. Tribune Co.*, 307 Ill. 595, 601, 139 N. E.

would have to put his approval on those kind of things as an individual."

William M. Parker, Jr., testified that he associated the statements in the two paragraphs with "the Commissioners of the City of Montgomery," and since respondent "was the Police Commissioner," he "thought of him first." He told the examining counsel: "I think if you were the Police Commissioner I would have thought it was speaking of you."

Horace W. White, respondent's former employer, testified that the statement about "truck-loads of police" made him think of respondent "as being the head of the Police Department." Asked whether he read the statement as charging respondent himself with ringing the campus or having shotguns and tear-gas, he replied: "Well, I thought of his department being charged with it, yes, sir. He is the head of the Police Department as I understand it." He further said that the reason he would have been unwilling to re-employ respondent if he had believed the advertisement was "the fact that he allowed the Police Department to do the things that the paper say he did."

²⁹ Compare *Ponder v. Cobb*, 257 N. C. 281, 126 S. E. 2d 67 (1962).

86, 88 (1923). The present proposition would sidestep this obstacle by transmuting criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed. There is no legal alchemy by which a State may thus create the cause of action that would otherwise be denied for a publication which, as respondent himself said of the advertisement, "reflects not only on me but on the other Commissioners and the community." Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression.³⁰ We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations. Since it was relied on exclusively here, and there was no other evidence to connect the statements with respondent, the evidence was constitutionally insufficient to support a finding that the statements referred to respondent.

The judgment of the Supreme Court of Alabama is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

³⁰ Insofar as the proposition means only that the statements about police conduct libeled respondent by implicitly criticizing his ability to run the Police Department, recovery is also precluded in this case by the doctrine of fair comment. See American Law Institute, Restatement of Torts (1938), § 607. Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. Both defenses are of course defeasible if the public official proves actual malice, as was not done here.

[APPENDIX.]

Heed Their Rising

AS the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U. S. Constitution and the Bill of Rights. In their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom....

In Orangeburg, South Carolina, when 400 students peacefully sought to buy doughnuts and coffee at lunch counters in the business district, they were forcibly ejected, tear-gassed, soaked to the skin in freezing weather with fire hoses, arrested en masse and herded into an open barbed-wire stockade to stand for hours in the bitter cold.

In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was pad-
HeinOnline 376 U.S. 17 1963

protagonists of democracy. Their courage and ing restraint have inspired millions and given dignity to the cause of freedom.

Small wonder that the Southern violators of the Constitution fear this new, non-violent freedom fighter . . . even as they fear the right-to-vote movement. Small wonder that they determined to destroy the one man who, any other, symbolizes the new spirit now sweeping the South—the Rev. Dr. Martin Luther King, famous leader of the Montgomery Bus Protest. It is his doctrine of non-violence which has inspired and guided the students in their widening protests; and it this same Dr. King who founded the Southern Christian Leadership Conference—the organization which is spearheading the surging right-to-vote movement. Under his direction the Leadership Conference conducted Summer Leadership Workshops and Seminars in the philosophy and technique of non-violent resistance.

Again and again the Southern violators have answered Dr. King's peaceful protests with repression and violence. They have bombed his home, killed his wife and child. They have as-

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

I concur in reversing this half-million-dollar judgment against the New York Times Company and the four individual defendants. In reversing the Court holds that "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." *Ante*, p. 283. I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely "delimit" a State's power to award damages to "public officials against critics of their official conduct" but completely prohibit a State from exercising such a power. The Court goes on to hold that a State can subject such critics to damages if "actual malice" can be proved against them. "Malice," even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment. Unlike the Court, therefore, I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials. I do not base my vote to reverse on any failure to prove that these individual defendants signed the advertisement or that their criticism of the Police Department was aimed at the plaintiff Sullivan, who was then the Montgomery City Commissioner having supervision of the city's police; for present purposes I assume these things were proved. Nor is my reason for reversal the size of the half-million-dollar judgment, large as it is. If Alabama has constitutional power to use its civil libel law to impose damages on the press for criticizing the way public officials perform or fail

to perform their duties, I know of no provision in the Federal Constitution which either expressly or impliedly bars the State from fixing the amount of damages.

The half-million-dollar verdict does give dramatic proof; however, that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials. The factual background of this case emphasizes the imminence and enormity of that threat. One of the acute and highly emotional issues in this country arises out of efforts of many people, even including some public officials, to continue state-commanded segregation of races in the public schools and other public places, despite our several holdings that such a state practice is forbidden by the Fourteenth Amendment. Montgomery is one of the localities in which widespread hostility to desegregation has been manifested. This hostility has sometimes extended itself to persons who favor desegregation, particularly to so-called "outside agitators," a term which can be made to fit papers like the Times, which is published in New York. The scarcity of testimony to show that Commissioner Sullivan suffered any actual damages at all suggests that these feelings of hostility had at least as much to do with rendition of this half-million-dollar verdict as did an appraisal of damages. Viewed realistically, this record lends support to an inference that instead of being damaged Commissioner Sullivan's political, social, and financial prestige has likely been enhanced by the Times' publication. Moreover, a second half-million-dollar libel verdict against the Times based on the same advertisement has already been awarded to another Commissioner. There a jury again gave the full amount claimed. There is no reason to believe that there are not more such huge verdicts lurking just around the corner for the Times or any other newspaper or broadcaster which

might dare to criticize public officials. In fact, briefs before us show that in Alabama there are now pending eleven libel suits by local and state officials against the Times seeking \$5,600,000, and five such suits against the Columbia Broadcasting System seeking \$1,700,000. Moreover, this technique for harassing and punishing a free press—now that it has been shown to be possible—is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers.

In my opinion the Federal Constitution has dealt with this deadly danger to the press in the only way possible without leaving the free press open to destruction—by granting the press an absolute immunity for criticism of the way public officials do their public duty. Compare *Barr v. Matteo*, 360 U. S. 564. Stopgap measures like those the Court adopts are in my judgment not enough. This record certainly does not indicate that any different verdict would have been rendered here whatever the Court had charged the jury about “malice,” “truth,” “good motives,” “justifiable ends,” or any other legal formulas which in theory would protect the press. Nor does the record indicate that any of these legalistic words would have caused the courts below to set aside or to reduce the half-million-dollar verdict in any amount.

I agree with the Court that the Fourteenth Amendment made the First applicable to the States.¹ This means to me that since the adoption of the Fourteenth Amendment a State has no more power than the Federal Government to use a civil libel law or any other law to impose damages for merely discussing public affairs and criticizing public officials. The power of the United

¹See cases collected in *Speiser v. Randall*, 357 U. S. 513, 530 (concurring opinion).

States to do that is, in my judgment, precisely nil. Such was the general view held when the First Amendment was adopted and ever since.² Congress never has sought to challenge this viewpoint by passing any civil libel law. It did pass the Sedition Act in 1798,³ which made it a crime—"seditious libel"—to criticize federal officials or the Federal Government. As the Court's opinion correctly points out, however, *ante*, pp. 273-276, that Act came to an ignominious end and by common consent has generally been treated as having been a wholly unjustifiable and much to be regretted violation of the First Amendment. Since the First Amendment is now made applicable to the States by the Fourteenth, it no more permits the States to impose damages for libel than it does the Federal Government.

We would, I think, more faithfully interpret the First Amendment by holding that at the very least it leaves the people and the press free to criticize officials and discuss public affairs with impunity. This Nation of ours elects many of its important officials; so do the States, the municipalities, the counties, and even many precincts. These officials are responsible to the people for the way they perform their duties. While our Court has held that some kinds of speech and writings, such as "obscenity," *Roth v. United States*, 354 U. S. 476, and "fighting words," *Chaplinsky v. New Hampshire*, 315 U. S. 568, are not expression within the protection of the First Amendment,⁴ freedom to discuss public affairs and public officials

² See, e. g., 1 Tucker, Blackstone's Commentaries (1803), 297-299 (editor's appendix). St. George Tucker, a distinguished Virginia jurist, took part in the Annapolis Convention of 1786, sat on both state and federal courts, and was widely known for his writings on judicial and constitutional subjects.

³ Act of July 14, 1798, 1 Stat. 596.

⁴ But see *Smith v. California*, 361 U. S. 147, 155 (concurring opinion); *Roth v. United States*, 354 U. S. 476, 508 (dissenting opinion).

is unquestionably, as the Court today holds, the kind of speech the First Amendment was primarily designed to keep within the area of free discussion. To punish the exercise of this right to discuss public affairs or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed. This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials. "For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it."⁵ An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment.⁶

I regret that the Court has stopped short of this holding indispensable to preserve our free press from destruction.

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE DOUGLAS joins, concurring in the result.

The Court today announces a constitutional standard which prohibits "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with

⁵ 1 Tucker, Blackstone's Commentaries (1803), 297 (editor's appendix); cf. Brant, Seditious Libel: Myth and Reality, 39 N. Y. U. L. Rev. 1.

⁶ Cf. Meiklejohn, Free Speech and Its Relation to Self-Government (1948).

'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Ante*, at 279–280. The Court thus rules that the Constitution gives citizens and newspapers a "conditional privilege" immunizing nonmalicious misstatements of fact regarding the official conduct of a government officer. The impressive array of history¹ and precedent marshaled by the Court, however, confirms my belief that the Constitution affords greater protection than that provided by the Court's standard to citizen and press in exercising the right of public criticism.

In my view, the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses. The prized American right "to speak one's mind," cf. *Bridges v. California*, 314 U. S. 252, 270, about public officials and affairs needs "breathing space to survive," *N. A. A. C. P. v. Button*, 371 U. S. 415, 433. The right should not depend upon a probing by the jury of the motivation² of the citizen or press. The theory

¹ I fully agree with the Court that the attack upon the validity of the Sedition Act of 1798, 1 Stat. 596, "has carried the day in the court of history," *ante*, at 276, and that the Act would today be declared unconstitutional. It should be pointed out, however, that the Sedition Act proscribed writings which were "false, scandalous and malicious." (Emphasis added.) For prosecutions under the Sedition Act charging malice, see, e. g., Trial of Matthew Lyon (1798), in Wharton, *State Trials of the United States* (1849), p. 333; Trial of Thomas Cooper (1800), in *id.*, at 659; Trial of Anthony Haswell (1800), in *id.*, at 684; Trial of James Thompson Callender (1800), in *id.*, at 688.

² The requirement of proving actual malice or reckless disregard may, in the mind of the jury, add little to the requirement of proving falsity, a requirement which the Court recognizes not to be an adequate safeguard. The thought suggested by Mr. Justice Jackson in *United States v. Ballard*, 322 U. S. 78, 92–93, is relevant here: "[A]s a matter of either practice or philosophy I do not see how

of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious. In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel.

It has been recognized that "prosecutions for libel on government have [no] place in the American system of jurisprudence." *City of Chicago v. Tribune Co.*, 307 Ill. 595, 601, 139 N. E. 86, 88. I fully agree. Government, however, is not an abstraction; it is made up of individuals—of governors responsible to the governed. In a democratic society where men are free by ballots to remove those in power, any statement critical of governmental action is necessarily "of and concerning" the governors and any statement critical of the governors' official conduct is necessarily "of and concerning" the government. If the rule that libel on government has no place in our Constitution is to have real meaning, then libel on the official conduct of the governors likewise can have no place in our Constitution.

We must recognize that we are writing upon a clean slate.³ As the Court notes, although there have been

we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen." See note 4, *infra*.

³ It was not until *Gitlow v. New York*, 268 U. S. 652, decided in 1925, that it was intimated that the freedom of speech guaranteed by

"statements of this Court to the effect that the Constitution does not protect libelous publications . . . [n]one of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials." *Ante*, at 268. We should be particularly careful, therefore, adequately to protect the liberties which are embodied in the First and Fourteenth Amendments. It may be urged that deliberately and maliciously false statements have no conceivable value as free speech. That argument, however, is not responsive to the real issue presented by this case, which is whether that freedom of speech which all agree is constitutionally protected can be effectively safeguarded by a rule allowing the imposition of liability upon a jury's evaluation of the speaker's state of mind. If individual citizens may be held liable in damages for strong words, which a jury finds false and maliciously motivated, there can be little doubt that public debate and advocacy will be constrained. And if newspapers, publishing advertisements dealing with public issues, thereby risk liability, there can also be little doubt that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished. Cf. *Farmers Educational & Coop. Union v. WDAY, Inc.*, 360 U. S. 525, 530. The opinion of the Court conclusively demonstrates the chilling effect of the Alabama libel laws on First Amendment freedoms

the First Amendment was applicable to the States by reason of the Fourteenth Amendment. Other intimations followed. See *Whitney v. California*, 274 U. S. 357; *Fiske v. Kansas*, 274 U. S. 380. In 1931 Chief Justice Hughes speaking for the Court in *Stromberg v. California*, 283 U. S. 359, 368, declared: "It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech." Thus we deal with a constitutional principle enunciated less than four decades ago, and consider for the first time the application of that principle to issues arising in libel cases brought by state officials.

in the area of race relations. The American Colonists were not willing, nor should we be, to take the risk that "[m]en who injure and oppress the people under their administration [and] provoke them to cry out and complain" will also be empowered to "make that very complaint the foundation for new oppressions and prosecutions." *The Trial of John Peter Zenger*, 17 Howell's St. Tr. 675, 721-722 (1735) (argument of counsel to the jury). To impose liability for critical, albeit erroneous or even malicious, comments on official conduct would effectively resurrect "the obsolete doctrine that the governed must not criticize their governors." Cf. *Sweeney v. Patterson*, 76 U. S. App. D. C. 23, 24, 128 F. 2d 457, 458.

Our national experience teaches that repressions breed hate and "that hate menaces stable government." *Whitney v. California*, 274 U. S. 357, 375 (Brandeis, J., concurring). We should be ever mindful of the wise counsel of Chief Justice Hughes:

"[I]mperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." *De Jonge v. Oregon*, 299 U. S. 353, 365.

This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen. Freedom of press and of speech insures that government will respond to the will of the people and that changes may be obtained by peaceful means. Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not

abridge the freedom of public speech or any other freedom protected by the First Amendment.⁴ This, of course, cannot be said "where public officials are concerned or where public matters are involved. . . . [O]ne main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it." Douglas, *The Right of the People* (1958), p. 41.

In many jurisdictions, legislators, judges and executive officers are clothed with absolute immunity against liability for defamatory words uttered in the discharge of their public duties. See, e. g., *Barr v. Matteo*, 360 U. S. 564; *City of Chicago v. Tribune Co.*, 307 Ill., at 610, 139 N. E., at 91. Judge Learned Hand ably summarized the policies underlying the rule:

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the

⁴ In most cases, as in the case at bar, there will be little difficulty in distinguishing defamatory speech relating to private conduct from that relating to official conduct. I recognize, of course, that there will be a gray area. The difficulties of applying a public-private standard are, however, certainly of a different genre from those attending the differentiation between a malicious and nonmalicious state of mind. If the constitutional standard is to be shaped by a concept of malice, the speaker takes the risk not only that the jury will inaccurately determine his state of mind but also that the jury will fail properly to apply the constitutional standard set by the elusive concept of malice. See note 2, *supra*.

case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . .

"The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him. . . ." *Gregoire v. Biddle*, 177 F. 2d 579, 581.

If the government official should be immune from libel actions so that his ardor to serve the public will not be dampened and "fearless, vigorous, and effective administration of policies of government" not be inhibited, *Barr v. Matteo, supra*, at 571, then the citizen and the press should likewise be immune from libel actions for their criticism of official conduct. Their ardor as citizens will thus not be dampened and they will be free "to applaud or to criticize the way public employees do their jobs, from the least to the most important."⁵ If liability can attach to political criticism because it damages the reputation of a public official as a public official, then no critical citizen can safely utter anything but faint praise about the government or its officials. The vigorous criticism by press and citizen of the conduct of the government of the day by the officials of the day will soon yield to silence if officials in control of government agencies, instead of answering criticisms, can resort to friendly juries to forestall criticism of their official conduct.⁶

The conclusion that the Constitution affords the citizen and the press an absolute privilege for criticism of official conduct does not leave the public official without defenses against unsubstantiated opinions or deliberate misstatements. "Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgment . . . of free speech" *Wood v. Georgia*, 370 U. S. 375, 389. The public

⁵ MR. JUSTICE BLACK concurring in *Barr v. Matteo*, 360 U. S. 564, 577, observed that: "The effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an informed understanding depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important."

⁶ See notes 2, 4, *supra*.

official certainly has equal if not greater access than most private citizens to media of communication. In any event, despite the possibility that some excesses and abuses may go unremedied, we must recognize that "the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, [certain] liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell v. Connecticut*, 310 U. S. 296, 310. As Mr. Justice Brandeis correctly observed, "sunlight is the most powerful of all disinfectants."⁷

For these reasons, I strongly believe that the Constitution accords citizens and press an unconditional freedom to criticize official conduct. It necessarily follows that in a case such as this, where all agree that the allegedly defamatory statements related to official conduct, the judgments for libel cannot constitutionally be sustained.

⁷ See Freund, *The Supreme Court of the United States* (1949), p. 61.

HEINONLINE

Citation: 403 U.S. 713 1970

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Sun Apr 17 21:59:00 2011

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.

Syllabus

NEW YORK TIMES CO. v. UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1873. Argued June 26, 1971—Decided June 30, 1971*

The United States, which brought these actions to enjoin publication in the New York Times and in the Washington Post of certain classified material, has not met the "heavy burden of showing justification for the enforcement of such a [prior] restraint."

No. 1873, 444 F. 2d 544, reversed and remanded; No. 1885, — U. S. App. D. C. —, 446 F. 2d 1327, affirmed.

Alexander M. Bickel argued the cause for petitioner in No. 1873. With him on the brief were *William E. Hegarty* and *Lawrence J. McKay*.

Solicitor General Griswold argued the cause for the United States in both cases. With him on the brief were *Assistant Attorney General Mardian* and *Daniel M. Friedman*.

William R. Glendon argued the cause for respondents in No. 1885. With him on the brief were *Roger A. Clark*, *Anthony F. Essaye*, *Leo P. Larkin, Jr.*, and *Stanley Godofsky*.

Briefs of *amici curiae* were filed by *Bob Eckhardt* and *Thomas I. Emerson* for Twenty-Seven Members of Congress; by *Norman Dorsen*, *Melvin L. Wulf*, *Burt Neuborne*, *Bruce J. Ennis*, *Osmond K. Fraenkel*, and *Marvin M. Karpatkin* for the American Civil Liberties Union; and by *Victor Rabinowitz* for the National Emergency Civil Liberties Committee.

*Together with No. 1885, *United States v. Washington Post Co. et al.*, on certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Per Curiam

403 U. S.

PER CURIAM.

We granted certiorari in these cases in which the United States seeks to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled "History of U. S. Decision-Making Process on Viet Nam Policy." *Post*, pp. 942, 943.

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 70 (1963); see also *Near v. Minnesota*, 283 U. S. 697 (1931). The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe*, 402 U. S. 415, 419 (1971). The District Court for the Southern District of New York in the *New York Times* case and the District Court for the District of Columbia and the Court of Appeals for the District of Columbia Circuit in the *Washington Post* case held that the Government had not met that burden. We agree.

The judgment of the Court of Appeals for the District of Columbia Circuit is therefore affirmed. The order of the Court of Appeals for the Second Circuit is reversed and the case is remanded with directions to enter a judgment affirming the judgment of the District Court for the Southern District of New York. The stays entered June 25, 1971, by the Court are vacated. The judgments shall issue forthwith.

So ordered.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

I adhere to the view that the Government's case against the Washington Post should have been dismissed and that the injunction against the New York Times should have been vacated without oral argument when the cases were first presented to this Court. I believe

that every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment. Furthermore, after oral argument, I agree completely that we must affirm the judgment of the Court of Appeals for the District of Columbia Circuit and reverse the judgment of the Court of Appeals for the Second Circuit for the reasons stated by my Brothers DOUGLAS and BRENNAN. In my view it is unfortunate that some of my Brethren are apparently willing to hold that the publication of news may sometimes be enjoined. Such a holding would make a shambles of the First Amendment.

Our Government was launched in 1789 with the adoption of the Constitution. The Bill of Rights, including the First Amendment, followed in 1791. Now, for the first time in the 182 years since the founding of the Republic, the federal courts are asked to hold that the First Amendment does not mean what it says, but rather means that the Government can halt the publication of current news of vital importance to the people of this country.

In seeking injunctions against these newspapers and in its presentation to the Court, the Executive Branch seems to have forgotten the essential purpose and history of the First Amendment. When the Constitution was adopted, many people strongly opposed it because the document contained no Bill of Rights to safeguard certain basic freedoms.¹ They especially feared that the

¹ In introducing the Bill of Rights in the House of Representatives, Madison said: "[B]ut I believe that the great mass of the people who opposed [the Constitution], disliked it because it did not contain effectual provisions against the encroachments on particular rights" 1 Annals of Cong. 433. Congressman Goodhue added: "[I]t is the wish of many of our constituents, that something should be added to the Constitution, to secure in a stronger manner their liberties from the inroads of power." *Id.*, at 426.

new powers granted to a central government might be interpreted to permit the government to curtail freedom of religion, press, assembly, and speech. In response to an overwhelming public clamor, James Madison offered a series of amendments to satisfy citizens that these great liberties would remain safe and beyond the power of government to abridge. Madison proposed what later became the First Amendment in three parts, two of which are set out below, and one of which proclaimed: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."² (Emphasis added.) The amendments were offered to *curtail* and *restrict* the general powers granted to the Executive, Legislative, and Judicial Branches two years before in the original Constitution. The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly. Yet the Solicitor General argues and some members of the Court appear to agree that the general powers of the Government adopted in the original Constitution should be interpreted to limit and restrict the specific and emphatic guarantees of the Bill of Rights adopted later. I can imagine no greater perversion of history. Madison and the other Framers of the First Amendment, able men

² The other parts were:

"The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."

"The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances."

1 Annals of Cong. 434.

that they were, wrote in language they earnestly believed could never be misunderstood: "Congress shall make no law . . . abridging the freedom . . . of the press" Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.

In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.

The Government's case here is based on premises entirely different from those that guided the Framers of the First Amendment. The Solicitor General has carefully and emphatically stated:

"Now, Mr. Justice [BLACK], your construction of . . . [the First Amendment] is well known, and I certainly respect it. You say that no law means no law, and that should be obvious. I can only

say, Mr. Justice, that to me it is equally obvious that 'no law' does not mean 'no law', and I would seek to persuade the Court that that is true. . . . [T]here are other parts of the Constitution that grant powers and responsibilities to the Executive, and . . . the First Amendment was not intended to make it impossible for the Executive to function or to protect the security of the United States."³

And the Government argues in its brief that in spite of the First Amendment, "[t]he authority of the Executive Department to protect the nation against publication of information whose disclosure would endanger the national security stems from two interrelated sources: the constitutional power of the President over the conduct of foreign affairs and his authority as Commander-in-Chief."⁴

In other words, we are asked to hold that despite the First Amendment's emphatic command, the Executive Branch, the Congress, and the Judiciary can make laws enjoining publication of current news and abridging freedom of the press in the name of "national security." The Government does not even attempt to rely on any act of Congress. Instead it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to "make" a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law.⁵ See concurring opinion of MR. JUSTICE DOUGLAS,

³ Tr. of Oral Arg. 76.

⁴ Brief for the United States 13-14.

⁵ Compare the views of the Solicitor General with those of James Madison, the author of the First Amendment. When speaking of the Bill of Rights in the House of Representatives, Madison said: "If they [the first ten amendments] are incorporated into the Con-

post, at 721–722. To find that the President has “inherent power” to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make “secure.” No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this Nation for all time.

The word “security” is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged. This thought was eloquently expressed in 1937 by Mr. Chief Justice Hughes—great man and great Chief Justice that he was—when the Court held a man could not be punished for attending a meeting run by Communists.

“The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free

stitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.” 1 Annals of Cong. 439.

assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.”⁶

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK joins, concurring.

While I join the opinion of the Court I believe it necessary to express my views more fully.

It should be noted at the outset that the First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” That leaves, in my view, no room for governmental restraint on the press.¹

There is, moreover, no statute barring the publication by the press of the material which the Times and the Post seek to use. Title 18 U. S. C. § 793 (e) provides that “[w]hoever having unauthorized possession of, access to, or control over any document, writing . . . or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates . . . the same to any person not entitled to receive it . . . [s]hall be fined

⁶ *De Jonge v. Oregon*, 299 U. S. 353, 365.

¹ See *Beauharnais v. Illinois*, 343 U. S. 250, 267 (dissenting opinion of MR. JUSTICE BLACK), 284 (my dissenting opinion); *Roth v. United States*, 354 U. S. 476, 508 (my dissenting opinion which MR. JUSTICE BLACK joined); *Yates v. United States*, 354 U. S. 298, 339 (separate opinion of MR. JUSTICE BLACK which I joined); *New York Times Co. v. Sullivan*, 376 U. S. 254, 293 (concurring opinion of MR. JUSTICE BLACK which I joined); *Garrison v. Louisiana*, 379 U. S. 64, 80 (my concurring opinion which MR. JUSTICE BLACK joined).

not more than \$10,000 or imprisoned not more than ten years, or both."

The Government suggests that the word "communicates" is broad enough to encompass publication.

There are eight sections in the chapter on espionage and censorship, §§ 792-799. In three of those eight "publish" is specifically mentioned: § 794 (b) applies to "Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, *publishes*, or communicates . . . [the disposition of armed forces]."

Section 797 applies to whoever "reproduces, *publishes*, sells, or gives away" photographs of defense installations.

Section 798 relating to cryptography applies to whoever: "communicates, furnishes, transmits, or otherwise makes available . . . or *publishes*" the described material.² (Emphasis added.)

Thus it is apparent that Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act.

The other evidence that § 793 does not apply to the press is a rejected version of § 793. That version read: "During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, declare the existence of such emergency and, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the

² These documents contain data concerning the communications system of the United States, the publication of which is made a crime. But the criminal sanction is not urged by the United States as the basis of equity power.

enemy." 55 Cong. Rec. 1763. During the debates in the Senate the First Amendment was specifically cited and that provision was defeated. 55 Cong. Rec. 2167.

Judge Gurfein's holding in the *Times* case that this Act does not apply to this case was therefore pre-eminently sound. Moreover, the Act of September 23, 1950, in amending 18 U. S. C. § 793 states in § 1 (b) that:

"Nothing in this Act shall be construed to authorize, require, or establish military or civilian censorship or in any way to limit or infringe upon freedom of the press or of speech as guaranteed by the Constitution of the United States and no regulation shall be promulgated hereunder having that effect." 64 Stat. 987.

Thus Congress has been faithful to the command of the First Amendment in this area.

So any power that the Government possesses must come from its "inherent power."

The power to wage war is "the power to wage war successfully." See *Hirabayashi v. United States*, 320 U. S. 81, 93. But the war power stems from a declaration of war. The Constitution by Art. I, § 8, gives Congress, not the President, power "[t]o declare War." Nowhere are presidential wars authorized. We need not decide therefore what leveling effect the war power of Congress might have.

These disclosures³ may have a serious impact. But that is no basis for sanctioning a previous restraint on

³ There are numerous sets of this material in existence and they apparently are not under any controlled custody. Moreover, the President has sent a set to the Congress. We start then with a case where there already is rather wide distribution of the material that is destined for publicity, not secrecy. I have gone over the material listed in the *in camera* brief of the United States. It is all history, not future events. None of it is more recent than 1968.

the press. As stated by Chief Justice Hughes in *Near v. Minnesota*, 283 U. S. 697, 719-720:

"While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct."

As we stated only the other day in *Organization for a Better Austin v. Keefe*, 402 U. S. 415, 419, "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity."

The Government says that it has inherent powers to go into court and obtain an injunction to protect the national interest, which in this case is alleged to be national security.

Near v. Minnesota, 283 U. S. 697, repudiated that expansive doctrine in no uncertain terms.

The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental sup-

pression of embarrassing information. It is common knowledge that the First Amendment was adopted against the widespread use of the common law of seditious libel to punish the dissemination of material that is embarrassing to the powers-that-be. See T. Emerson, *The System of Freedom of Expression*, c. V (1970); Z. Chafee, *Free Speech in the United States*, c. XIII (1941). The present cases will, I think, go down in history as the most dramatic illustration of that principle. A debate of large proportions goes on in the Nation over our posture in Vietnam. That debate antedated the disclosure of the contents of the present documents. The latter are highly relevant to the debate in progress.

Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be "uninhibited, robust, and wide-open" debate. *New York Times Co. v. Sullivan*, 376 U. S. 254, 269-270.

I would affirm the judgment of the Court of Appeals in the *Post* case, vacate the stay of the Court of Appeals in the *Times* case and direct that it affirm the District Court.

The stays in these cases that have been in effect for more than a week constitute a flouting of the principles of the First Amendment as interpreted in *Near v. Minnesota*.

MR. JUSTICE BRENNAN, concurring.

I

I write separately in these cases only to emphasize what should be apparent: that our judgments in the present cases may not be taken to indicate the propriety, in the future, of issuing temporary stays and restraining

orders to block the publication of material sought to be suppressed by the Government. So far as I can determine, never before has the United States sought to enjoin a newspaper from publishing information in its possession. The relative novelty of the questions presented, the necessary haste with which decisions were reached, the magnitude of the interests asserted, and the fact that all the parties have concentrated their arguments upon the question whether permanent restraints were proper may have justified at least some of the restraints heretofore imposed in these cases. Certainly it is difficult to fault the several courts below for seeking to assure that the issues here involved were preserved for ultimate review by this Court. But even if it be assumed that some of the interim restraints were proper in the two cases before us, that assumption has no bearing upon the propriety of similar judicial action in the future. To begin with, there has now been ample time for reflection and judgment; whatever values there may be in the preservation of novel questions for appellate review may not support any restraints in the future. More important, the First Amendment stands as an absolute bar to the imposition of judicial restraints in circumstances of the kind presented by these cases.

II

The error that has pervaded these cases from the outset was the granting of any injunctive relief whatsoever, interim or otherwise. The entire thrust of the Government's claim throughout these cases has been that publication of the material sought to be enjoined "could," or "might," or "may" prejudice the national interest in various ways. But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences

may result.* Our cases, it is true, have indicated that there is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the Nation "is at war," *Schenck v. United States*, 249 U. S. 47, 52 (1919), during which times "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Near v. Minnesota*, 283 U. S. 697, 716 (1931). Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the Government presented or even alleged that publication of items from or based upon the material at issue would cause the happening of an event of that nature. "[T]he chief purpose of [the First Amendment's] guaranty [is] to prevent previous restraints upon publication." *Near v. Minnesota, supra*, at 713. Thus, only governmental allegation and proof that publication must inevitably, di-

**Freedman v. Maryland*, 380 U. S. 51 (1965), and similar cases regarding temporary restraints of allegedly obscene materials are not in point. For those cases rest upon the proposition that "obscenity is not protected by the freedoms of speech and press." *Roth v. United States*, 354 U. S. 476, 481 (1957). Here there is no question but that the material sought to be suppressed is within the protection of the First Amendment; the only question is whether, notwithstanding that fact, its publication may be enjoined for a time because of the presence of an overwhelming national interest. Similarly, copyright cases have no pertinence here: the Government is not asserting an interest in the particular form of words chosen in the documents, but is seeking to suppress the ideas expressed therein. And the copyright laws, of course, protect only the form of expression and not the ideas expressed.

rectly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient: for if the Executive Branch seeks judicial aid in preventing publication, it must inevitably submit the basis upon which that aid is sought to scrutiny by the judiciary. And therefore, every restraint issued in this case, whatever its form, has violated the First Amendment—and not less so because that restraint was justified as necessary to afford the courts an opportunity to examine the claim more thoroughly. Unless and until the Government has clearly made out its case, the First Amendment commands that no injunction may issue.

MR. JUSTICE STEWART, with whom MR. JUSTICE WHITE joins, concurring.

In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative¹ and Judicial² branches, has been pressed to the very hilt since the advent of the nuclear missile age. For better or for worse, the simple fact is that a

¹ The President's power to make treaties and to appoint ambassadors is, of course, limited by the requirement of Art. II, § 2, of the Constitution that he obtain the advice and consent of the Senate. Article I, § 8, empowers Congress to "raise and support Armies," and "provide and maintain a Navy." And, of course, Congress alone can declare war. This power was last exercised almost 30 years ago at the inception of World War II. Since the end of that war in 1945, the Armed Forces of the United States have suffered approximately half a million casualties in various parts of the world.

² See *Chicago & Southern Air Lines v. Waterman S. S. Corp.*, 333 U. S. 103; *Hirabayashi v. United States*, 320 U. S. 81; *United States v. Curtiss-Wright Corp.*, 299 U. S. 304; cf. *Mora v. McNamara*, 128 U. S. App. D. C. 297, 387 F. 2d 862, cert. denied, 389 U. S. 934.

President of the United States possesses vastly greater constitutional independence in these two vital areas of power than does, say, a prime minister of a country with a parliamentary form of government.

In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.

Yet it is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is.³ If the Constitution gives the Executive

³ "It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which

a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. It is an awesome responsibility, requiring judgment and wisdom of a high order. I should suppose that moral, political, and practical considerations would dictate that a very first principle of that wisdom would be an insistence upon avoiding secrecy for its own sake. For when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion. I should suppose, in short, that the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained. But be that as it may, it is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect

would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted. . . ." *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 320.

the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.

This is not to say that Congress and the courts have no role to play. Undoubtedly Congress has the power to enact specific and appropriate criminal laws to protect government property and preserve government secrets. Congress has passed such laws, and several of them are of very colorable relevance to the apparent circumstances of these cases. And if a criminal prosecution is instituted, it will be the responsibility of the courts to decide the applicability of the criminal law under which the charge is brought. Moreover, if Congress should pass a specific law authorizing civil proceedings in this field, the courts would likewise have the duty to decide the constitutionality of such a law as well as its applicability to the facts proved.

But in the cases before us we are asked neither to construe specific regulations nor to apply specific laws. We are asked, instead, to perform a function that the Constitution gave to the Executive, not the Judiciary. We are asked, quite simply, to prevent the publication by two newspapers of material that the Executive Branch insists should not, in the national interest, be published. I am convinced that the Executive is correct with respect to some of the documents involved. But I cannot say that disclosure of any of them will surely result in direct, immediate, and irreparable damage to our Nation or its people. That being so, there can under the First Amendment be but one judicial resolution of the issues before us. I join the judgments of the Court.

MR. JUSTICE WHITE, with whom MR. JUSTICE STEWART joins, concurring.

I concur in today's judgments, but only because of the concededly extraordinary protection against prior re-

straints enjoyed by the press under our constitutional system. I do not say that in no circumstances would the First Amendment permit an injunction against publishing information about government plans or operations.¹ Nor, after examining the materials the Government characterizes as the most sensitive and destructive, can I deny that revelation of these documents will do substantial damage to public interests. Indeed, I am confident that their disclosure will have that result. But I nevertheless agree that the United States has not satisfied the very heavy burden that it must meet to warrant an injunction against publication in these cases, at least in the absence of express and appropriately limited congressional authorization for prior restraints in circumstances such as these.

¹ The Congress has authorized a strain of prior restraints against private parties in certain instances. The National Labor Relations Board routinely issues cease-and-desist orders against employers who it finds have threatened or coerced employees in the exercise of protected rights. See 29 U. S. C. § 160 (c). Similarly, the Federal Trade Commission is empowered to impose cease-and-desist orders against unfair methods of competition. 15 U. S. C. § 45 (b). Such orders can, and quite often do, restrict what may be spoken or written under certain circumstances. See, e. g., *NLRB v. Gissel Packing Co.*, 395 U. S. 575, 616–620 (1969). Article I, § 8, of the Constitution authorizes Congress to secure the “exclusive right” of authors to their writings, and no one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another. See *Westermann Co. v. Dispatch Co.*, 249 U. S. 100 (1919). Newspapers do themselves rely from time to time on the copyright as a means of protecting their accounts of important events. However, those enjoined under the statutes relating to the National Labor Relations Board and the Federal Trade Commission are private parties, not the press; and when the press is enjoined under the copyright laws the complainant is a private copyright holder enforcing a private right. These situations are quite distinct from the Government’s request for an injunction against publishing information about the affairs of government, a request admittedly not based on any statute.

The Government's position is simply stated: The responsibility of the Executive for the conduct of the foreign affairs and for the security of the Nation is so basic that the President is entitled to an injunction against publication of a newspaper story whenever he can convince a court that the information to be revealed threatens "grave and irreparable" injury to the public interest;² and the injunction should issue whether or not the material to be published is classified, whether or not publication would be lawful under relevant criminal statutes enacted by Congress, and regardless of the circumstances by which the newspaper came into possession of the information.

At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press. Much of the difficulty inheres in the "grave and irreparable danger" standard suggested by the United States. If the United States were to have judgment under such a standard in these cases, our decision would be of little guidance to other courts in other cases, for the material at issue here would not be available from the Court's opinion or from public records, nor would it be published by the press. Indeed, even today where we hold that the United States has not met its burden, the material remains sealed in court records and it is

² The "grave and irreparable danger" standard is that asserted by the Government in this Court. In remanding to Judge Gurfein for further hearings in the *Times* litigation, five members of the Court of Appeals for the Second Circuit directed him to determine whether disclosure of certain items specified with particularity by the Government would "pose such grave and immediate danger to the security of the United States as to warrant their publication being enjoined."

properly not discussed in today's opinions. Moreover, because the material poses substantial dangers to national interests and because of the hazards of criminal sanctions, a responsible press may choose never to publish the more sensitive materials. To sustain the Government in these cases would start the courts down a long and hazardous road that I am not willing to travel, at least without congressional guidance and direction.

It is not easy to reject the proposition urged by the United States and to deny relief on its good-faith claims in these cases that publication will work serious damage to the country. But that discomfiture is considerably dispelled by the infrequency of prior-restraint cases. Normally, publication will occur and the damage be done before the Government has either opportunity or grounds for suppression. So here, publication has already begun and a substantial part of the threatened damage has already occurred. The fact of a massive breakdown in security is known, access to the documents by many unauthorized people is undeniable, and the efficacy of equitable relief against these or other newspapers to avert anticipated damage is doubtful at best.

What is more, terminating the ban on publication of the relatively few sensitive documents the Government now seeks to suppress does not mean that the law either requires or invites newspapers or others to publish them or that they will be immune from criminal action if they do. Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.

When the Espionage Act was under consideration in

1917, Congress eliminated from the bill a provision that would have given the President broad powers in time of war to proscribe, under threat of criminal penalty, the publication of various categories of information related to the national defense.³ Congress at that time was unwilling to clothe the President with such far-reaching powers to monitor the press, and those opposed to this part of the legislation assumed that a necessary concomitant of such power was the power to “filter out the news to the people through some man.” 55 Cong. Rec. 2008 (remarks of Sen. Ashurst). However, these same members of Congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed. Senator Ashurst, for example, was quite sure that the editor of such a newspaper “should be punished if he did publish information as to the movements of the fleet, the troops, the aircraft, the location of powder factories, the location of defense works, and all that sort of thing.” *Id.*, at 2009.⁴

³ “Whoever, in time of war, in violation of reasonable regulations to be prescribed by the President, which he is hereby authorized to make and promulgate, shall publish any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense calculated to be useful to the enemy, shall be punished by a fine . . . or by imprisonment . . .” 55 Cong. Rec. 2100.

⁴ Senator Ashurst also urged that “‘freedom of the press’ means freedom from the restraints of a censor, means the absolute liberty and right to publish whatever you wish; but you take your chances of punishment in the courts of your country for the violation of the laws of libel, slander, and treason.” 55 Cong. Rec. 2005.

The Criminal Code contains numerous provisions potentially relevant to these cases. Section 797⁵ makes it a crime to publish certain photographs or drawings of military installations. Section 798,⁶ also in precise language, proscribes knowing and willful publication of any classified information concerning the cryptographic sys-

⁵ Title 18 U. S. C. § 797 provides:

"On and after thirty days from the date upon which the President defines any vital military or naval installation or equipment as being within the category contemplated under section 795 of this title, whoever reproduces, publishes, sells, or gives away any photograph, sketch, picture, drawing, map, or graphical representation of the vital military or naval installations or equipment so defined, without first obtaining permission of the commanding officer of the military or naval post, camp, or station concerned, or higher authority, unless such photograph, sketch, picture, drawing, map, or graphical representation has clearly indicated thereon that it has been censored by the proper military or naval authority, shall be fined not more than \$1,000 or imprisoned not more than one year, or both."

⁶ In relevant part 18 U. S. C. § 798 provides:

"(a) Whoever knowingly and willfully communicates, furnishes, transmits, or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States any classified information—

"(1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or

"(2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or

"(3) concerning the communication intelligence activities of the United States or any foreign government; or

"(4) obtained by the process of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes—

"Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both."

tems or communication intelligence activities of the United States as well as any information obtained from communication intelligence operations.⁷ If any of the material here at issue is of this nature, the newspapers are presumably now on full notice of the position of the United States and must face the consequences if they

⁷ The purport of 18 U. S. C. § 798 is clear. Both the House and Senate Reports on the bill, in identical terms, speak of furthering the security of the United States by preventing disclosure of information concerning the cryptographic systems and the communication intelligence systems of the United States, and explaining that "[t]his bill makes it a crime to reveal the methods, techniques, and matériel used in the transmission by this Nation of enciphered or coded messages. . . . Further, it makes it a crime to reveal methods used by this Nation in breaking the secret codes of a foreign nation. It also prohibits under certain penalties the divulging of any information which may have come into this Government's hands as a result of such a code-breaking." H. R. Rep. No. 1895, 81st Cong., 2d Sess., 1 (1950). The narrow reach of the statute was explained as covering "only a small category of classified matter, a category which is both vital and vulnerable to an almost unique degree." *Id.*, at 2. Existing legislation was deemed inadequate.

"At present two other acts protect this information, but only in a limited way. These are the Espionage Act of 1917 (40 Stat. 217) and the act of June 10, 1933 (48 Stat. 122). Under the first, unauthorized revelation of information of this kind can be penalized only if it can be proved that the person making the revelation did so with an intent to injure the United States. Under the second, only diplomatic codes and messages transmitted in diplomatic codes are protected. The present bill is designed to protect against knowing and willful publication or any other revelation of all important information affecting the United States communication intelligence operations and all direct information about all United States codes and ciphers." *Ibid.*

Section 798 obviously was intended to cover publications by non-employees of the Government and to ease the Government's burden in obtaining convictions. See H. R. Rep. No. 1895, *supra*, at 2-5. The identical Senate Report, not cited in parallel in the text of this footnote, is S. Rep. No. 111, 81st Cong., 1st Sess. (1949).

publish. I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.

The same would be true under those sections of the Criminal Code casting a wider net to protect the national defense. Section 793 (e) ⁸ makes it a criminal act for any unauthorized possessor of a document "relating to the national defense" either (1) willfully to communicate or cause to be communicated that document to any person not entitled to receive it or (2) willfully to retain the document and fail to deliver it to an officer of the United States entitled to receive it. The subsection was added in 1950 because pre-existing law provided no

⁸ Section 793 (e) of 18 U. S. C. provides that:

"(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;"

is guilty of an offense punishable by 10 years in prison, a \$10,000 fine, or both. It should also be noted that 18 U. S. C. § 793 (g), added in 1950 (see 64 Stat. 1004; S. Rep. No. 2369, pt. 1, 81st Cong., 2d Sess., 9 (1950)), provides that "[i]f two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy."

penalty for the unauthorized possessor unless demand for the documents was made.⁹ "The dangers surrounding the unauthorized possession of such items are self-

⁹ The amendment of § 793 that added subsection (e) was part of the Subversive Activities Control Act of 1950, which was in turn Title I of the Internal Security Act of 1950. See 64 Stat. 987. The report of the Senate Judiciary Committee best explains the purposes of the amendment:

"Section 18 of the bill amends section 793 of title 18 of the United States Code (espionage statute). The several paragraphs of section 793 of title 18 are designated as subsections (a) through (g) for purposes of convenient reference. The significant changes which would be made in section 793 of title 18 are as follows:

"(1) Amends the fourth paragraph of section 793, title 18 (subsec. (d)), to cover the unlawful dissemination of 'information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation.' *The phrase 'which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation' would modify only 'information relating to the national defense' and not the other items enumerated in the subsection.* The fourth paragraph of section 793 is also amended to provide that only those with lawful possession of the items relating to national defense enumerated therein may retain them subject to demand therefor. Those who have unauthorized possession of such items are treated in a separate subsection.

"(2) Amends section 793, title 18 (subsec. (e)), to provide that unauthorized possessors of items enumerated in paragraph 4 of section 793 must surrender possession thereof to the proper authorities without demand. Existing law provides no penalty for the unauthorized possession of such items unless a demand for them is made by the person entitled to receive them. The dangers surrounding the unauthorized possession of such items are self-evident, and it is deemed advisable to require their surrender in such a case, regardless of demand, especially since their unauthorized possession may be unknown to the authorities who would otherwise make the demand. The only difference between subsection (d) and subsection (e) of section 793 is that a demand by the person entitled to receive the items would be a necessary element of an offense under subsection (d) where the possession is lawful, whereas such

evident, and it is deemed advisable to require their surrender in such a case, regardless of demand, especially since their unauthorized possession may be unknown to the authorities who would otherwise make the demand." S. Rep. No. 2369, pt. 1, 81st Cong., 2d Sess., 9 (1950). Of course, in the cases before us, the unpublished documents have been demanded by the United States and their import has been made known at least to counsel for the newspapers involved. In *Gorin v. United States*, 312 U. S. 19, 28 (1941), the words "national defense" as used in a predecessor of § 793 were held by a unanimous Court to have "a well understood connotation"—a "generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness"—and to be "sufficiently definite to apprise the public of prohibited activi-

a demand would not be a necessary element of an offense under subsection (e) where the possession is unauthorized." S. Rep. No. 2369, pt. 1, 81st Cong., 2d Sess., 8-9 (1950) (emphasis added).

It seems clear from the foregoing, contrary to the intimations of the District Court for the Southern District of New York in this case, that in prosecuting for communicating or withholding a "document" as contrasted with similar action with respect to "information" the Government need not prove an intent to injure the United States or to benefit a foreign nation but only willful and knowing conduct. The District Court relied on *Gorin v. United States*, 312 U. S. 19 (1941). But that case arose under other parts of the predecessor to § 793, see 312 U. S., at 21-22—parts that imposed different intent standards not repeated in § 793 (d) or § 793 (e). Cf. 18 U. S. C. §§ 793 (a), (b), and (c). Also, from the face of subsection (e) and from the context of the Act of which it was a part, it seems undeniable that a newspaper, as well as others unconnected with the Government, are vulnerable to prosecution under § 793 (e) if they communicate or withhold the materials covered by that section. The District Court ruled that "communication" did not reach publication by a newspaper of documents relating to the national defense. I intimate no views on the correctness of that conclusion. But neither communication nor publication is necessary to violate the subsection.

ties" and to be consonant with due process. 312 U. S., at 28. Also, as construed by the Court in *Gorin*, information "connected with the national defense" is obviously not limited to that threatening "grave and irreparable" injury to the United States.¹⁰

It is thus clear that Congress has addressed itself to the problems of protecting the security of the country and the national defense from unauthorized disclosure of potentially damaging information. Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 585-586 (1952); see also *id.*, at 593-628 (Frankfurter, J., concurring). It has not, however, authorized the injunctive remedy against threatened publication. It has apparently been satisfied to rely on criminal sanctions and their deterrent effect on the responsible as well as the irresponsible press. I am not, of course, saying that either of these newspapers has yet committed a crime or that either would commit a crime if it published all the material now in its possession. That matter must await resolution in the context of a criminal proceeding if one is instituted by the United States. In that event, the issue of guilt or innocence would be determined by procedures and standards quite different from those that have purported to govern these injunctive proceedings.

MR. JUSTICE MARSHALL, concurring.

The Government contends that the only issue in these cases is whether in a suit by the United States, "the First Amendment bars a court from prohibiting a news-

¹⁰ Also relevant is 18 U. S. C. § 794. Subsection (b) thereof forbids in time of war the collection or publication, with intent that it shall be communicated to the enemy, of any information with respect to the movements of military forces, "or with respect to the plans or conduct . . . of any naval or military operations . . . or any other information relating to the public defense, which might be useful to the enemy"

paper from publishing material whose disclosure would pose a 'grave and immediate danger to the security of the United States.'" Brief for the United States 7. With all due respect, I believe the ultimate issue in these cases is even more basic than the one posed by the Solicitor General. The issue is whether this Court or the Congress has the power to make law.

In these cases there is no problem concerning the President's power to classify information as "secret" or "top secret." Congress has specifically recognized Presidential authority, which has been formally exercised in Exec. Order 10501 (1953), to classify documents and information. See, *e. g.*, 18 U. S. C. § 798; 50 U. S. C. § 783.¹ Nor is there any issue here regarding the President's power as Chief Executive and Commander in Chief to protect national security by disciplining employees who disclose information and by taking precautions to prevent leaks.

The problem here is whether in these particular cases the Executive Branch has authority to invoke the equity jurisdiction of the courts to protect what it believes to be the national interest. See *In re Debs*, 158 U. S. 564, 584 (1895). The Government argues that in addition to the inherent power of any government to protect itself, the President's power to conduct foreign affairs and his position as Commander in Chief give him authority to impose censorship on the press to protect his ability to deal effectively with foreign nations and to conduct the military affairs of the country. Of course, it is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief. *Chicago & Southern Air Lines v. Waterman S. S. Corp.*, 333 U. S. 103 (1948); *Hirabayashi v. United States*, 320 U. S. 81, 93 (1943); *United States v. Curtiss-*

¹ See n. 3, *infra*.

Wright Corp., 299 U. S. 304 (1936).² And in some situations it may be that under whatever inherent powers the Government may have, as well as the implicit authority derived from the President's mandate to conduct foreign affairs and to act as Commander in Chief, there is a basis for the invocation of the equity jurisdiction of this Court as an aid to prevent the publication of material damaging to "national security," however that term may be defined.

It would, however, be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit. There would be a similar damage to the basic concept of these co-equal branches of Government if when the Executive Branch has adequate authority granted by Congress to protect "national security" it can choose instead to invoke the contempt power of a court to enjoin the threatened conduct. The Constitution provides that Congress shall make laws, the President execute laws, and courts interpret laws. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952). It did not provide for government by injunction in which the courts and the Executive Branch can "make law" without regard to the action of Congress. It may be more convenient for the Executive Branch if it need only convince a judge to prohibit conduct rather than ask the Congress to pass a law, and it may be more convenient to enforce a contempt order than to seek a criminal conviction in a jury trial. Moreover, it may be considered politically wise to get a court to share the responsibility for arresting those who the Executive Branch has probable cause to believe are violating the law. But convenience and political considerations of the

² But see *Kent v. Dulles*, 357 U. S. 116 (1958); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952).

moment do not justify a basic departure from the principles of our system of government.

In these cases we are not faced with a situation where Congress has failed to provide the Executive with broad power to protect the Nation from disclosure of damaging state secrets. Congress has on several occasions given extensive consideration to the problem of protecting the military and strategic secrets of the United States. This consideration has resulted in the enactment of statutes making it a crime to receive, disclose, communicate, withhold, and publish certain documents, photographs, instruments, appliances, and information. The bulk of these statutes is found in chapter 37 of U. S. C., Title 18, entitled Espionage and Censorship.³ In that chapter,

³ There are several other statutory provisions prohibiting and punishing the dissemination of information, the disclosure of which Congress thought sufficiently imperiled national security to warrant that result. These include 42 U. S. C. §§ 2161 through 2166 relating to the authority of the Atomic Energy Commission to classify and declassify "Restricted Data" ["Restricted Data" is a term of art employed uniquely by the Atomic Energy Act]. Specifically, 42 U. S. C. § 2162 authorizes the Atomic Energy Commission to classify certain information. Title 42 U. S. C. § 2274, subsection (a), provides penalties for a person who "communicates, transmits, or discloses [restricted data] . . . with intent to injure the United States or with intent to secure an advantage to any foreign nation" Subsection (b) of § 2274 provides lesser penalties for one who "communicates, transmits, or discloses" such information "with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation" Other sections of Title 42 of the United States Code dealing with atomic energy prohibit and punish acquisition, removal, concealment, tampering with, alteration, mutilation, or destruction of documents incorporating "Restricted Data" and provide penalties for employees and former employees of the Atomic Energy Commission, the armed services, contractors and licensees of the Atomic Energy Commission. Title 42 U. S. C. §§ 2276, 2277. Title 50 U. S. C. App. § 781, 56 Stat. 390, prohibits the making of any sketch or other representation of military installations or any military equipment located on any military instal-

Congress has provided penalties ranging from a \$10,000 fine to death for violating the various statutes.

Thus it would seem that in order for this Court to issue an injunction it would require a showing that such an injunction would enhance the already existing power of the Government to act. See *Bennett v. Laman*, 277 N. Y. 368, 14 N. E. 2d 439 (1938). It is a traditional axiom of equity that a court of equity will not do a useless thing just as it is a traditional axiom that equity will not enjoin the commission of a crime. See Z. Chafee & E. Re, *Equity* 935-954 (5th ed. 1967); 1 H. Joyce, *Injunctions* §§ 58-60a (1909). Here there has been no attempt to make such a showing. The Solicitor General does not even mention in his brief whether the Government considers that there is probable cause to believe a crime has been committed or whether there is a conspiracy to commit future crimes.

If the Government had attempted to show that there was no effective remedy under traditional criminal law, it would have had to show that there is no arguably applicable statute. Of course, at this stage this Court could not and cannot determine whether there has been a violation of a particular statute or decide the constitutionality of any statute. Whether a good-faith prosecution could have been instituted under any statute could, however, be determined.

lation, as specified; and indeed Congress in the National Defense Act of 1940, 54 Stat. 676, as amended, 56 Stat. 179, conferred jurisdiction on federal district courts over civil actions "to enjoin any violation" thereof. 50 U. S. C. App. § 1152 (6). Title 50 U. S. C. § 783 (b) makes it unlawful for any officers or employees of the United States or any corporation which is owned by the United States to communicate material which has been "classified" by the President to any person who that governmental employee knows or has reason to believe is an agent or representative of any foreign government or any Communist organization.

At least one of the many statutes in this area seems relevant to these cases. Congress has provided in 18 U. S. C. § 793 (e) that whoever "having unauthorized possession of, access to, or control over any document, writing, code book, signal book . . . or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits . . . the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . . [s]hall be fined not more than \$10,000 or imprisoned not more than ten years, or both." Congress has also made it a crime to conspire to commit any of the offenses listed in 18 U. S. C. § 793 (e).

It is true that Judge Gurfein found that Congress had not made it a crime to publish the items and material specified in § 793 (e). He found that the words "communicates, delivers, transmits . . ." did not refer to publication of newspaper stories. And that view has some support in the legislative history and conforms with the past practice of using the statute only to prosecute those charged with ordinary espionage. But see 103 Cong. Rec. 10449 (remarks of Sen. Humphrey). Judge Gurfein's view of the statute is not, however, the only plausible construction that could be given. See my Brother WHITE's concurring opinion.

Even if it is determined that the Government could not in good faith bring criminal prosecutions against the New York Times and the Washington Post, it is clear that Congress has specifically rejected passing legislation that would have clearly given the President the power he seeks here and made the current activity of the newspapers unlawful. When Congress specifically declines to make conduct unlawful it is not for this Court

to redecide those issues—to overrule Congress. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952).

On at least two occasions Congress has refused to enact legislation that would have made the conduct engaged in here unlawful and given the President the power that he seeks in this case. In 1917 during the debate over the original Espionage Act, still the basic provisions of § 793, Congress rejected a proposal to give the President in time of war or threat of war authority to directly prohibit by proclamation the publication of information relating to national defense that might be useful to the enemy. The proposal provided that:

“During any national emergency resulting from a war to which the United States is a party, or from threat of such a war, the President may, by proclamation, declare the existence of such emergency and, by proclamation, prohibit the publishing or communicating of, or the attempting to publish or communicate any information relating to the national defense which, in his judgment, is of such character that it is or might be useful to the enemy. Whoever violates any such prohibition shall be punished by a fine of not more than \$10,000 or by imprisonment for not more than 10 years, or both: *Provided*, That nothing in this section shall be construed to limit or restrict any discussion, comment, or criticism of the acts or policies of the Government or its representatives or the publication of the same.” 55 Cong. Rec. 1763.

Congress rejected this proposal after war against Germany had been declared even though many believed that there was a grave national emergency and that the threat of security leaks and espionage was serious. The Executive Branch has not gone to Congress and requested that the decision to provide such power be reconsidered. In-

stead, the Executive Branch comes to this Court and asks that it be granted the power Congress refused to give.

In 1957 the United States Commission on Government Security found that "[a]irplane journals, scientific periodicals, and even the daily newspaper have featured articles containing information and other data which should have been deleted in whole or in part for security reasons." In response to this problem the Commission proposed that "Congress enact legislation making it a crime for any person willfully to disclose without proper authorization, for any purpose whatever, information classified 'secret' or 'top secret,' knowing, or having reasonable grounds to believe, such information to have been so classified." Report of Commission on Government Security 619-620 (1957). After substantial floor discussion on the proposal, it was rejected. See 103 Cong. Rec. 10447-10450. If the proposal that Sen. Cotton championed on the floor had been enacted, the publication of the documents involved here would certainly have been a crime. Congress refused, however, to make it a crime. The Government is here asking this Court to remake that decision. This Court has no such power.

Either the Government has the power under statutory grant to use traditional criminal law to protect the country or, if there is no basis for arguing that Congress has made the activity a crime, it is plain that Congress has specifically refused to grant the authority the Government seeks from this Court. In either case this Court does not have authority to grant the requested relief. It is not for this Court to fling itself into every breach perceived by some Government official nor is it for this Court to take on itself the burden of enacting law, especially a law that Congress has refused to pass.

I believe that the judgment of the United States Court of Appeals for the District of Columbia Circuit should

be affirmed and the judgment of the United States Court of Appeals for the Second Circuit should be reversed insofar as it remands the case for further hearings.

MR. CHIEF JUSTICE BURGER, dissenting.

So clear are the constitutional limitations on prior restraint against expression, that from the time of *Near v. Minnesota*, 283 U. S. 697 (1931), until recently in *Organization for a Better Austin v. Keefe*, 402 U. S. 415 (1971), we have had little occasion to be concerned with cases involving prior restraints against news reporting on matters of public interest. There is, therefore, little variation among the members of the Court in terms of resistance to prior restraints against publication. Adherence to this basic constitutional principle, however, does not make these cases simple. In these cases, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the Executive. Only those who view the First Amendment as an absolute in all circumstances—a view I respect, but reject—can find such cases as these to be simple or easy.

These cases are not simple for another and more immediate reason. We do not know the facts of the cases. No District Judge knew all the facts. No Court of Appeals judge knew all the facts. No member of this Court knows all the facts.

Why are we in this posture, in which only those judges to whom the First Amendment is absolute and permits of no restraint in any circumstances or for any reason, are really in a position to act?

I suggest we are in this posture because these cases have been conducted in unseemly haste. MR. JUSTICE HARLAN covers the chronology of events demonstrating the hectic pressures under which these cases have been processed and I need not restate them. The prompt

setting of these cases reflects our universal abhorrence of prior restraint. But prompt judicial action does not mean unjudicial haste.

Here, moreover, the frenetic haste is due in large part to the manner in which the Times proceeded from the date it obtained the purloined documents. It seems reasonably clear now that the haste precluded reasonable and deliberate judicial treatment of these cases and was not warranted. The precipitate action of this Court aborting trials not yet completed is not the kind of judicial conduct that ought to attend the disposition of a great issue.

The newspapers make a derivative claim under the First Amendment; they denominate this right as the public "right to know"; by implication, the Times asserts a sole trusteeship of that right by virtue of its journalistic "scoop." The right is asserted as an absolute. Of course, the First Amendment right itself is not an absolute, as Justice Holmes so long ago pointed out in his aphorism concerning the right to shout "fire" in a crowded theater if there was no fire. There are other exceptions, some of which Chief Justice Hughes mentioned by way of example in *Near v. Minnesota*. There are no doubt other exceptions no one has had occasion to describe or discuss. Conceivably such exceptions may be lurking in these cases and would have been flushed had they been properly considered in the trial courts, free from unwarranted deadlines and frenetic pressures. An issue of this importance should be tried and heard in a judicial atmosphere conducive to thoughtful, reflective deliberation, especially when haste, in terms of hours, is unwarranted in light of the long period the Times, by its own choice, deferred publication.¹

¹ As noted elsewhere the Times conducted its analysis of the 47 volumes of Government documents over a period of several months and did so with a degree of security that a government might envy. Such security was essential, of course, to protect the enterprise

It is not disputed that the Times has had unauthorized possession of the documents for three to four months, during which it has had its expert analysts studying them, presumably digesting them and preparing the material for publication. During all of this time, the Times, presumably in its capacity as trustee of the public's "right to know," has held up publication for purposes it considered proper and thus public knowledge was delayed. No doubt this was for a good reason; the analysis of 7,000 pages of complex material drawn from a vastly greater volume of material would inevitably take time and the writing of good news stories takes time. But why should the United States Government, from whom this information was illegally acquired by someone, along with all the counsel, trial judges, and appellate judges be placed under needless pressure? After these months of deferral, the alleged "right to know" has somehow and suddenly become a right that must be vindicated *instanter*.

Would it have been unreasonable, since the newspaper could anticipate the Government's objections to release of secret material, to give the Government an opportunity to review the entire collection and determine whether agreement could be reached on publication? Stolen or not, if security was not in fact jeopardized, much of the material could no doubt have been declassified, since it spans a period ending in 1968. With such an approach—one that great newspapers have in the past practiced and stated editorially to be the duty of an honorable press—the newspapers and Government might well have nar-

from others. Meanwhile the Times has copyrighted its material and there were strong intimations in the oral argument that the Times contemplated enjoining its use by any other publisher in violation of its copyright. Paradoxically this would afford it a protection, analogous to prior restraint, against all others—a protection the Times denies the Government of the United States.

rowed the area of disagreement as to what was and was not publishable, leaving the remainder to be resolved in orderly litigation, if necessary. To me it is hardly believable that a newspaper long regarded as a great institution in American life would fail to perform one of the basic and simple duties of every citizen with respect to the discovery or possession of stolen property or secret government documents. That duty, I had thought—perhaps naively—was to report forthwith, to responsible public officers. This duty rests on taxi drivers, Justices, and the New York Times. The course followed by the Times, whether so calculated or not, removed any possibility of orderly litigation of the issues. If the action of the judges up to now has been correct, that result is sheer happenstance.²

Our grant of the writ of certiorari before final judgment in the *Times* case aborted the trial in the District Court before it had made a complete record pursuant to the mandate of the Court of Appeals for the Second Circuit.

The consequence of all this melancholy series of events is that we literally do not know what we are acting on. As I see it, we have been forced to deal with litigation concerning rights of great magnitude without an adequate record, and surely without time for adequate treatment either in the prior proceedings or in this Court. It is interesting to note that counsel on both sides, in oral argument before this Court, were frequently unable to respond to questions on factual points. Not surprisingly they pointed out that they had been working literally “around the clock” and simply were unable to review the documents that give rise to these cases and

² Interestingly the Times explained its refusal to allow the Government to examine its own purloined documents by saying in substance this might compromise *its* sources and informants! The Times thus asserts a right to guard the secrecy of its sources while denying that the Government of the United States has that power.

were not familiar with them. This Court is in no better posture. I agree generally with MR. JUSTICE HARLAN and MR. JUSTICE BLACKMUN but I am not prepared to reach the merits.³

I would affirm the Court of Appeals for the Second Circuit and allow the District Court to complete the trial aborted by our grant of certiorari, meanwhile preserving the status quo in the *Post* case. I would direct that the District Court on remand give priority to the *Times* case to the exclusion of all other business of that court but I would not set arbitrary deadlines.

I should add that I am in general agreement with much of what MR. JUSTICE WHITE has expressed with respect to penal sanctions concerning communication or retention of documents or information relating to the national defense.

We all crave speedier judicial processes but when judges are pressured as in these cases the result is a parody of the judicial function.

MR. JUSTICE HARLAN, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

These cases forcefully call to mind the wise admonition of Mr. Justice Holmes, dissenting in *Northern Securities Co. v. United States*, 193 U. S. 197, 400-401 (1904):

“Great cases like hard cases make bad law. For great cases are called great, not by reason of their

³ With respect to the question of inherent power of the Executive to classify papers, records, and documents as secret, or otherwise unavailable for public exposure, and to secure aid of the courts for enforcement, there may be an analogy with respect to this Court. No statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.

real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."

With all respect, I consider that the Court has been almost irresponsibly feverish in dealing with these cases.

Both the Court of Appeals for the Second Circuit and the Court of Appeals for the District of Columbia Circuit rendered judgment on June 23. The New York Times' petition for certiorari, its motion for accelerated consideration thereof, and its application for interim relief were filed in this Court on June 24 at about 11 a. m. The application of the United States for interim relief in the *Post* case was also filed here on June 24 at about 7:15 p. m. This Court's order setting a hearing before us on June 26 at 11 a. m., a course which I joined only to avoid the possibility of even more peremptory action by the Court, was issued less than 24 hours before. The record in the *Post* case was filed with the Clerk shortly before 1 p. m. on June 25; the record in the *Times* case did not arrive until 7 or 8 o'clock that same night. The briefs of the parties were received less than two hours before argument on June 26.

This frenzied train of events took place in the name of the presumption against prior restraints created by the First Amendment. Due regard for the extraordinarily important and difficult questions involved in these litigations should have led the Court to shun such a precipitate timetable. In order to decide the merits of these cases properly, some or all of the following questions should have been faced:

1. Whether the Attorney General is authorized to bring these suits in the name of the United States. Com-

pare *In re Debs*, 158 U. S. 564 (1895), with *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952). This question involves as well the construction and validity of a singularly opaque statute—the Espionage Act, 18 U. S. C. § 793 (e).

2. Whether the First Amendment permits the federal courts to enjoin publication of stories which would present a serious threat to national security. See *Near v. Minnesota*, 283 U. S. 697, 716 (1931) (dictum).

3. Whether the threat to publish highly secret documents is of itself a sufficient implication of national security to justify an injunction on the theory that regardless of the contents of the documents harm enough results simply from the demonstration of such a breach of secrecy.

4. Whether the unauthorized disclosure of any of these particular documents would seriously impair the national security.

5. What weight should be given to the opinion of high officers in the Executive Branch of the Government with respect to questions 3 and 4.

6. Whether the newspapers are entitled to retain and use the documents notwithstanding the seemingly uncontested facts that the documents, or the originals of which they are duplicates, were purloined from the Government's possession and that the newspapers received them with knowledge that they had been feloniously acquired. Cf. *Liberty Lobby, Inc. v. Pearson*, 129 U. S. App. D. C. 74, 390 F. 2d 489 (1967, amended 1968).

7. Whether the threatened harm to the national security or the Government's possessory interest in the documents justifies the issuance of an injunction against publication in light of—

a. The strong First Amendment policy against prior restraints on publication;

b. The doctrine against enjoining conduct in violation of criminal statutes; and

c. The extent to which the materials at issue have apparently already been otherwise disseminated.

These are difficult questions of fact, of law, and of judgment; the potential consequences of erroneous decision are enormous. The time which has been available to us, to the lower courts,* and to the parties has been wholly inadequate for giving these cases the kind of consideration they deserve. It is a reflection on the stability of the judicial process that these great issues—as important as any that have arisen during my time on the Court—should have been decided under the pressures engendered by the torrent of publicity that has attended these litigations from their inception.

Forced as I am to reach the merits of these cases, I dissent from the opinion and judgments of the Court. Within the severe limitations imposed by the time constraints under which I have been required to operate, I can only state my reasons in telescoped form, even though in different circumstances I would have felt constrained to deal with the cases in the fuller sweep indicated above.

It is a sufficient basis for affirming the Court of Appeals for the Second Circuit in the *Times* litigation to observe that its order must rest on the conclusion that because of the time elements the Government had not been given an adequate opportunity to present its case

*The hearing in the *Post* case before Judge Gesell began at 8 a. m. on June 21, and his decision was rendered, under the hammer of a deadline imposed by the Court of Appeals, shortly before 5 p. m. on the same day. The hearing in the *Times* case before Judge Gurfein was held on June 18 and his decision was rendered on June 19. The Government's appeals in the two cases were heard by the Courts of Appeals for the District of Columbia and Second Circuits, each court sitting *en banc*, on June 22. Each court rendered its decision on the following afternoon.

to the District Court. At the least this conclusion was not an abuse of discretion.

In the *Post* litigation the Government had more time to prepare; this was apparently the basis for the refusal of the Court of Appeals for the District of Columbia Circuit on rehearing to conform its judgment to that of the Second Circuit. But I think there is another and more fundamental reason why this judgment cannot stand—a reason which also furnishes an additional ground for not reinstating the judgment of the District Court in the *Times* litigation, set aside by the Court of Appeals. It is plain to me that the scope of the judicial function in passing upon the activities of the Executive Branch of the Government in the field of foreign affairs is very narrowly restricted. This view is, I think, dictated by the concept of separation of powers upon which our constitutional system rests.

In a speech on the floor of the House of Representatives, Chief Justice John Marshall, then a member of that body, stated:

“The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.” 10 Annals of Cong. 613 (1800).

From that time, shortly after the founding of the Nation, to this, there has been no substantial challenge to this description of the scope of executive power. See *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 319–321 (1936), collecting authorities.

From this constitutional primacy in the field of foreign affairs, it seems to me that certain conclusions necessarily follow. Some of these were stated concisely by President Washington, declining the request of the House of Representatives for the papers leading up to the negotiation of the Jay Treaty:

“The nature of foreign negotiations requires caution, and their success must often depend on secrecy;

and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers." 1 J. Richardson, *Messages and Papers of the Presidents 194-195* (1896).

The power to evaluate the "pernicious influence" of premature disclosure is not, however, lodged in the Executive alone. I agree that, in performance of its duty to protect the values of the First Amendment against political pressures, the judiciary must review the initial Executive determination to the point of satisfying itself that the subject matter of the dispute does lie within the proper compass of the President's foreign relations power. Constitutional considerations forbid "a complete abandonment of judicial control." Cf. *United States v. Reynolds*, 345 U. S. 1, 8 (1953). Moreover, the judiciary may properly insist that the determination that disclosure of the subject matter would irreparably impair the national security be made by the head of the Executive Department concerned—here the Secretary of State or the Secretary of Defense—after actual personal consideration by that officer. This safeguard is required in the analogous area of executive claims of privilege for secrets of state. See *id.*, at 8 and n. 20; *Duncan v. Cammell, Laird & Co.*, [1942] A. C. 624, 638 (House of Lords).

But in my judgment the judiciary may not properly go beyond these two inquiries and redetermine for itself the probable impact of disclosure on the national security.

"[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such de-

cisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & Southern Air Lines v. Waterman Steamship Corp.*, 333 U. S. 103, 111 (1948) (Jackson, J.).

Even if there is some room for the judiciary to override the executive determination, it is plain that the scope of review must be exceedingly narrow. I can see no indication in the opinions of either the District Court or the Court of Appeals in the *Post* litigation that the conclusions of the Executive were given even the deference owing to an administrative agency, much less that owing to a co-equal branch of the Government operating within the field of its constitutional prerogative.

Accordingly, I would vacate the judgment of the Court of Appeals for the District of Columbia Circuit on this ground and remand the case for further proceedings in the District Court. Before the commencement of such further proceedings, due opportunity should be afforded the Government for procuring from the Secretary of State or the Secretary of Defense or both an expression of their views on the issue of national security. The ensuing review by the District Court should be in accordance with the views expressed in this opinion. And for the reasons stated above I would affirm the judgment of the Court of Appeals for the Second Circuit.

Pending further hearings in each case conducted under the appropriate ground rules, I would continue the

restraints on publication. I cannot believe that the doctrine prohibiting prior restraints reaches to the point of preventing courts from maintaining the *status quo* long enough to act responsibly in matters of such national importance as those involved here.

MR. JUSTICE BLACKMUN, dissenting.

I join MR. JUSTICE HARLAN in his dissent. I also am in substantial accord with much that MR. JUSTICE WHITE says, by way of admonition, in the latter part of his opinion.

At this point the focus is on *only* the comparatively few documents specified by the Government as critical. So far as the other material—vast in amount—is concerned, let it be published and published forthwith if the newspapers, once the strain is gone and the sensationalism is eased, still feel the urge so to do.

But we are concerned here with the few documents specified from the 47 volumes. Almost 70 years ago Mr. Justice Holmes, dissenting in a celebrated case, observed:

“Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure” *Northern Securities Co. v. United States*, 193 U. S. 197, 400–401 (1904).

The present cases, if not great, are at least unusual in their posture and implications, and the Holmes observation certainly has pertinent application.

The New York Times clandestinely devoted a period of three months to examining the 47 volumes that came into its unauthorized possession. Once it had begun publi-

cation of material from those volumes, the New York case now before us emerged. It immediately assumed, and ever since has maintained, a frenetic pace and character. Seemingly, once publication started, the material could not be made public fast enough. Seemingly, from then on, every deferral or delay, by restraint or otherwise, was abhorrent and was to be deemed violative of the First Amendment and of the public's "right immediately to know." Yet that newspaper stood before us at oral argument and professed criticism of the Government for not lodging its protest earlier than by a Monday telegram following the initial Sunday publication.

The District of Columbia case is much the same.

Two federal district courts, two United States courts of appeals, and this Court—within a period of less than three weeks from inception until today—have been pressed into hurried decision of profound constitutional issues on inadequately developed and largely assumed facts without the careful deliberation that, one would hope, should characterize the American judicial process. There has been much writing about the law and little knowledge and less digestion of the facts. In the New York case the judges, both trial and appellate, had not yet examined the basic material when the case was brought here. In the District of Columbia case, little more was done, and what was accomplished in this respect was only on required remand, with the Washington Post, on the excuse that it was trying to protect its source of information, initially refusing to reveal what material it actually possessed, and with the District Court forced to make assumptions as to that possession.

With such respect as may be due to the contrary view, this, in my opinion, is not the way to try a lawsuit of this magnitude and asserted importance. It is not the way for federal courts to adjudicate, and to be required to adjudicate, issues that allegedly concern the Nation's

vital welfare. The country would be none the worse off were the cases tried quickly, to be sure, but in the customary and properly deliberative manner. The most recent of the material, it is said, dates no later than 1968, already about three years ago, and the Times itself took three months to formulate its plan of procedure and, thus, deprived its public for that period.

The First Amendment, after all, is only one part of an entire Constitution. Article II of the great document vests in the Executive Branch primary power over the conduct of foreign affairs and places in that branch the responsibility for the Nation's safety. Each provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. First Amendment absolutism has never commanded a majority of this Court. See, for example, *Near v. Minnesota*, 283 U. S. 697, 708 (1931), and *Schenck v. United States*, 249 U. S. 47, 52 (1919). What is needed here is a weighing, upon properly developed standards, of the broad right of the press to print and of the very narrow right of the Government to prevent. Such standards are not yet developed. The parties here are in disagreement as to what those standards should be. But even the newspapers concede that there are situations where restraint is in order and is constitutional. Mr. Justice Holmes gave us a suggestion when he said in *Schenck*,

"It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." 249 U. S., at 52.

I therefore would remand these cases to be developed expeditiously, of course, but on a schedule permitting the

orderly presentation of evidence from both sides, with the use of discovery, if necessary, as authorized by the rules, and with the preparation of briefs, oral argument, and court opinions of a quality better than has been seen to this point. In making this last statement, I criticize no lawyer or judge. I know from past personal experience the agony of time pressure in the preparation of litigation. But these cases and the issues involved and the courts, including this one, deserve better than has been produced thus far.

It may well be that if these cases were allowed to develop as they should be developed, and to be tried as lawyers should try them and as courts should hear them, free of pressure and panic and sensationalism, other light would be shed on the situation and contrary considerations, for me, might prevail. But that is not the present posture of the litigation.

The Court, however, decides the cases today the other way. I therefore add one final comment.

I strongly urge, and sincerely hope, that these two newspapers will be fully aware of their ultimate responsibilities to the United States of America. Judge Wilkey, dissenting in the District of Columbia case, after a review of only the affidavits before his court (the basic papers had not then been made available by either party), concluded that there were a number of examples of documents that, if in the possession of the Post, and if published, "could clearly result in great harm to the nation," and he defined "harm" to mean "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate" I, for one, have now been able to give at least some cursory study not only to the affidavits, but to the material itself. I regret to say that from this examination I fear that Judge Wilkey's statements have possible foundation. I therefore share

his concern. I hope that damage has not already been done. If, however, damage has been done, and if, with the Court's action today, these newspapers proceed to publish the critical documents and there results therefrom "the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate," to which list I might add the factors of prolongation of the war and of further delay in the freeing of United States prisoners, then the Nation's people will know where the responsibility for these sad consequences rests.

HEINONLINE

Citation: 413 U.S. 15 1972

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Sun Apr 17 22:06:34 2011

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.

Syllabus

MILLER v. CALIFORNIA

APPEAL FROM THE APPELLATE DEPARTMENT, SUPERIOR
COURT OF CALIFORNIA, COUNTY OF ORANGE

No. 70-73. Argued January 18-19, 1972—Reargued November 7,
1972—Decided June 21, 1973

Appellant was convicted of mailing unsolicited sexually explicit material in violation of a California statute that approximately incorporated the obscenity test formulated in *Memoirs v. Massachusetts*, 383 U. S. 413, 418 (plurality opinion). The trial court instructed the jury to evaluate the materials by the contemporary community standards of California. Appellant's conviction was affirmed on appeal. In lieu of the obscenity criteria enunciated by the *Memoirs* plurality, it is *held*:

1. Obscene material is not protected by the First Amendment. *Roth v. United States*, 354 U. S. 476, reaffirmed. A work may be subject to state regulation where that work, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does not have serious literary, artistic, political, or scientific value. Pp. 23-24.

2. The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Roth, supra*, at 489, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. If a state obscenity law is thus limited, First Amendment values are adequately protected by ultimate independent appellate review of constitutional claims when necessary. Pp. 24-25.

3. The test of "utterly without redeeming social value" articulated in *Memoirs, supra*, is rejected as a constitutional standard. Pp. 24-25.

4. The jury may measure the essentially factual issues of prurient appeal and patent offensiveness by the standard that prevails in the forum community, and need not employ a "national standard." Pp. 30-34.

Vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 37. BRENNAN, J., filed a dissenting opinion, in which STEWART and MARSHALL, JJ., joined, *post*, p. 47.

Burton Marks reargued the cause and filed a brief for appellant.

Michael R. Capizzi reargued the cause for appellee. With him on the brief was *Cecil Hicks*.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This is one of a group of "obscenity-pornography" cases being reviewed by the Court in a re-examination of standards enunciated in earlier cases involving what Mr. Justice Harlan called "the intractable obscenity problem." *Interstate Circuit, Inc. v. Dallas*, 390 U. S. 676, 704 (1968) (concurring and dissenting).

Appellant conducted a mass mailing campaign to advertise the sale of illustrated books, euphemistically called "adult" material. After a jury trial, he was convicted of violating California Penal Code § 311.2 (a), a misdemeanor, by knowingly distributing obscene matter,¹

**Samuel Rosenwein, A. L. Wirin, Fred Okrand, Laurence R. Sperber, Melvin L. Wulf, and Joel M. Gora* filed a brief for the American Civil Liberties Union of Southern California et al. as *amici curiae* urging reversal.

¹ At the time of the commission of the alleged offense, which was prior to June 25, 1969, §§ 311.2 (a) and 311 of the California Penal Code read in relevant part:

"§ 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state

"(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to dis-

15

Opinion of the Court

and the Appellate Department, Superior Court of California, County of Orange, summarily affirmed the judgment without opinion. Appellant's conviction was spe-

tribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor. . . ."

"§ 311. Definitions

"As used in this chapter:

"(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

"(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

Section 311 (e) of the California Penal Code, *supra*, was amended on June 25, 1969, to read as follows:

"(e) 'Knowingly' means being aware of the character of the matter."

Cal. Amended Stats. 1969, c. 249, § 1, p. 598. Despite appellant's contentions to the contrary, the record indicates that the new § 311 (e) was not applied *ex post facto* to his case, but only the old § 311 (e) as construed by state decisions prior to the commission of the alleged offense. See *People v. Pinkus*, 256 Cal. App. 2d 941, 948-950, 63 Cal. Rptr. 680, 685-686 (App. Dept., Superior Ct., Los Angeles, 1967); *People v. Campise*, 242 Cal. App. 2d 905, 914, 51 Cal. Rptr. 815, 821 (App. Dept., Superior Ct., San Diego, 1966). Cf. *Bouie v. City of Columbia*, 378 U.S. 347 (1964). Nor did § 311.2, *supra*, as applied, create any "direct, immediate burden on the per-

cifically based on his conduct in causing five unsolicited advertising brochures to be sent through the mail in an envelope addressed to a restaurant in Newport Beach, California. The envelope was opened by the manager of the restaurant and his mother. They had not requested the brochures; they complained to the police.

The brochures advertise four books entitled "Inter-course," "Man-Woman," "Sex Orgies Illustrated," and "An Illustrated History of Pornography," and a film entitled "Marital Intercourse." While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed.

I

This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material ²

formance of the postal functions," or infringe on congressional commerce powers under Art. I, § 8, cl. 3. *Roth v. United States*, 354 U. S. 476, 494 (1957), quoting *Railway Mail Assn. v. Corsi*, 326 U. S. 88, 96 (1945). See also *Mishkin v. New York*, 383 U. S. 502, 506 (1966); *Smith v. California*, 361 U. S. 147, 150-152 (1959).

² This Court has defined "obscene material" as "material which deals with sex in a manner appealing to prurient interest," *Roth v. United States*, *supra*, at 487, but the *Roth* definition does not reflect the precise meaning of "obscene" as traditionally used in the English language. Derived from the Latin *obscaenus*, *ob*, to, plus *caenum*, filth, "obscene" is defined in the Webster's Third New International Dictionary (Unabridged 1969) as "1a: dis-

when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. *Stanley v. Georgia*, 394 U. S. 557, 567 (1969); *Ginsberg v. New York*, 390 U. S. 629, 637-643 (1968); *Interstate Circuit, Inc. v. Dallas*, *supra*, at 690; *Redrup v. New York*, 386 U. S. 767, 769 (1967); *Jacobellis v. Ohio*, 378 U. S. 184, 195 (1964). See *Rabe v. Washington*, 405 U. S. 313, 317 (1972) (BURGER, C. J., concurring); *United States v. Reidel*, 402 U. S. 351, 360-362 (1971) (opinion of MARSHALL, J.); *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495, 502 (1952); *Breard v. Alexandria*, 341 U. S. 622, 644-645 (1951); *Kovacs v. Cooper*, 336 U. S. 77, 88-89 (1949); *Prince v. Massachusetts*, 321 U. S. 158, 169-170 (1944). Cf. *Butler v. Michigan*, 352 U. S. 380, 382-383 (1957); *Public Utilities Comm'n v. Pollak*, 343 U. S. 451, 464-465 (1952). It is in this context that we are called

gusting to the senses . . . b: grossly repugnant to the generally accepted notions of what is appropriate . . . 2: offensive or revolting as countering or violating some ideal or principle." The Oxford English Dictionary (1933 ed.) gives a similar definition, "[o]ffensive to the senses, or to taste or refinement; disgusting, repulsive, filthy, foul, abominable, loathsome."

The material we are discussing in this case is more accurately defined as "pornography" or "pornographic material." "Pornography" derives from the Greek (*pornè*, harlot, and *graphos*, writing). The word now means "1: a description of prostitutes or prostitution 2: a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement." Webster's Third New International Dictionary, *supra*. Pornographic material which is obscene forms a sub-group of all "obscene" expression, but not the whole, at least as the word "obscene" is now used in our language. We note, therefore, that the words "obscene material," as used in this case, have a specific judicial meaning which derives from the *Roth* case, *i. e.*, obscene material "which deals with sex." *Roth*, *supra*, at 487. See also ALI Model Penal Code § 251.4 (1) "Obscene Defined." (Official Draft 1962.)

on to define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment as applicable to the States through the Fourteenth Amendment.

The dissent of MR. JUSTICE BRENNAN reviews the background of the obscenity problem, but since the Court now undertakes to formulate standards more concrete than those in the past, it is useful for us to focus on two of the landmark cases in the somewhat tortured history of the Court's obscenity decisions. In *Roth v. United States*, 354 U. S. 476 (1957), the Court sustained a conviction under a federal statute punishing the mailing of "obscene, lewd, lascivious or filthy . . ." materials. The key to that holding was the Court's rejection of the claim that obscene materials were protected by the First Amendment. Five Justices joined in the opinion stating:

"All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . This is the same judgment expressed by this Court in *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571–572:

"'. . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *These include the lewd and obscene It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social*

value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . . [Emphasis by Court in *Roth* opinion.]

"We hold that obscenity is not within the area of constitutionally protected speech or press." 354 U. S., at 484-485 (footnotes omitted).

Nine years later, in *Memoirs v. Massachusetts*, 383 U. S. 413 (1966), the Court veered sharply away from the *Roth* concept and, with only three Justices in the plurality opinion, articulated a new test of obscenity. The plurality held that under the *Roth* definition

"as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Id.*, at 418.

The sharpness of the break with *Roth*, represented by the third element of the *Memoirs* test and emphasized by MR. JUSTICE WHITE's dissent, *id.*, at 460-462, was further underscored when the *Memoirs* plurality went on to state:

"The Supreme Judicial Court erred in holding that a book need not be 'unqualifiedly worthless before it can be deemed obscene.' A book cannot be proscribed unless it is found to be *utterly* without redeeming social value." *Id.*, at 419 (emphasis in original).

While *Roth* presumed "obscenity" to be "utterly without redeeming social importance," *Memoirs* required

that to prove obscenity it must be affirmatively established that the material is “utterly without redeeming social value.” Thus, even as they repeated the words of *Roth*, the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative, i. e., that the material was “utterly without redeeming social value”—a burden virtually impossible to discharge under our criminal standards of proof. Such considerations caused Mr. Justice Harlan to wonder if the “utterly without redeeming social value” test had any meaning at all. See *Memoirs v. Massachusetts*, *id.*, at 459 (Harlan, J., dissenting). See also *id.*, at 461 (WHITE, J., dissenting); *United States v. Groner*, 479 F. 2d 577, 579–581 (CA5 1973).

Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States’ police power. See, e. g., *Redrup v. New York*, 386 U. S., at 770–771. We have seen “a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.” *Interstate Circuit, Inc. v. Dallas*, 390 U. S., at 704–705 (Harlan, J., concurring and dissenting) (footnote omitted).³ This is not remarkable, for in the area

³ In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. *Redrup v. New York*, 386 U. S. 767 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup* “policy.” See *Walker v. Ohio*, 398 U. S. 434–435 (1970) (dissenting opinions of BURGER, C. J., and Harlan, J.). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us.

of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression. This is an area in which there are few eternal verities.

The case we now review was tried on the theory that the California Penal Code § 311 approximately incorporates the three-stage *Memoirs* test, *supra*. But now the *Memoirs* test has been abandoned as unworkable by its author,⁴ and no Member of the Court today supports the *Memoirs* formulation.

II

This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. *Kois v. Wisconsin*, 408 U. S. 229 (1972); *United States v. Reidel*, 402 U. S., at 354; *Roth v. United States*, *supra*, at 485.⁵ "The First and Fourteenth Amendments have never been treated as absolutes [footnote omitted]." *Breard v. Alexandria*, 341 U. S., at 642, and cases cited. See *Times Film Corp. v. Chicago*, 365 U. S. 43, 47-50 (1961); *Joseph Burstyn, Inc. v. Wilson*, 343 U. S., at 502. We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be

⁴ See the dissenting opinion of Mr. Justice Brennan in *Paris Adult Theatre I v. Slaton*, *post*, p. 73.

⁵ As Mr. Chief Justice Warren stated, dissenting, in *Jacobellis v. Ohio*, 378 U. S. 184, 200 (1964):

"For all the sound and fury that the *Roth* test has generated, it has not been proved unsound, and I believe that we should try to live with it—at least until a more satisfactory definition is evolved. No government—be it federal, state, or local—should be forced to choose between repressing all material, including that within the realm of decency, and allowing unrestrained license to publish any material, no matter how vile. There must be a rule of reason in this as in other areas of the law, and we have attempted in the *Roth* case to provide such a rule."

carefully limited. See *Interstate Circuit, Inc. v. Dallas*, *supra*, at 682–685. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed.⁶ A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

The basic guidelines for the trier of fact must be: (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin*, *supra*, at 230, quoting *Roth v. United States*, *supra*, at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the “utterly without redeeming social value” test of *Memoirs v. Massachusetts*,

⁶ See, e. g., Oregon Laws 1971, c. 743, Art. 29, §§ 255–262, and Hawaii Penal Code, Tit. 37, §§ 1210–1216, 1972 Hawaii Session Laws, Act 9, c. 12, pt. II, pp. 126–129, as examples of state laws directed at depiction of defined physical conduct, as opposed to expression. Other state formulations could be equally valid in this respect. In giving the Oregon and Hawaii statutes as examples, we do not wish to be understood as approving of them in all other respects nor as establishing their limits as the extent of state power.

We do not hold, as Mr. JUSTICE BRENNAN intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate. See *United States v. 12 200-ft. Reels of Film*, *post*, at 130 n. 7.

383 U. S., at 419; that concept has never commanded the adherence of more than three Justices at one time.⁷ See *supra*, at 21. If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. See *Kois v. Wisconsin*, *supra*, at 232; *Memoirs v. Massachusetts*, *supra*, at 459–460 (Harlan, J., dissenting); *Jacobellis v. Ohio*, 378 U. S., at 204 (Harlan, J., dissenting); *New York Times Co. v. Sullivan*, 376 U. S. 254, 284–285 (1964); *Roth v. United States*, *supra*, at 497–498 (Harlan, J., concurring and dissenting).

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can

⁷ “A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication . . .” *Kois v. Wisconsin*, 408 U. S. 229, 231 (1972). See *Memoirs v. Massachusetts*, 383 U. S. 413, 461 (1966) (WHITE, J., dissenting). We also reject, as a constitutional standard, the ambiguous concept of “social importance.” See *id.*, at 462 (WHITE, J., dissenting).

be exhibited or sold without limit in such public places.⁸ At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. See *Kois v. Wisconsin*, *supra*, at 230-232; *Roth v. United States*, *supra*, at 487; *Thornhill v. Alabama*, 310 U. S. 88, 101-102 (1940). For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.⁹

MR. JUSTICE BRENNAN, author of the opinions of the Court, or the plurality opinions, in *Roth v. United States*, *supra*; *Jacobellis v. Ohio*, *supra*; *Ginzburg v. United*

⁸ Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior. In *United States v. O'Brien*, 391 U. S. 367, 377 (1968), a case not dealing with obscenity, the Court held a State regulation of conduct which itself embodied both speech and nonspeech elements to be "sufficiently justified if . . . it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." See *California v. LaRue*, 409 U. S. 109, 117-118 (1972).

⁹ The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in *Roth v. United States*, 354 U. S., at 492 n. 30, "it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. Cf. *Dunlop v. United States*, 165 U. S. 486, 499-500."

States, 383 U. S. 463 (1966), *Mishkin v. New York*, 383 U. S. 502 (1966); and *Memoirs v. Massachusetts*, *supra*, has abandoned his former position and now maintains that no formulation of this Court, the Congress, or the States can adequately distinguish obscene material unprotected by the First Amendment from protected expression, *Paris Adult Theatre I v. Slaton*, *post*, p. 73 (BRENNAN, J., dissenting). Paradoxically, MR. JUSTICE BRENNAN indicates that suppression of unprotected obscene material is permissible to avoid exposure to unconsenting adults, as in this case, and to juveniles, although he gives no indication of how the division between protected and nonprotected materials may be drawn with greater precision for these purposes than for regulation of commercial exposure to consenting adults only. Nor does he indicate where in the Constitution he finds the authority to distinguish between a willing "adult" one month past the state law age of majority and a willing "juvenile" one month younger.

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. See *Roth v. United States*, *supra*, at 491-492. Cf. *Ginsberg v. New York*, 390 U. S., at 643.¹⁰ If

¹⁰ AS MR. JUSTICE BRENNAN stated for the Court in *Roth v. United States*, *supra*, at 491-492:

"Many decisions have recognized that these terms of obscenity statutes are not precise. [Footnote omitted.] This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. ' . . . [T]he Constitution does not require impossible standards'; all that is required is that the

the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or the Congress to regulate, then "hard core" pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike, as, indeed, MR. JUSTICE DOUGLAS contends. As to MR. JUSTICE DOUGLAS' position, see *United States v. Thirty-seven Photographs*, 402 U. S. 363, 379-380 (1971) (Black, J., joined by DOUGLAS, J., dissenting); *Ginzburg v. United States*, *supra*, at 476, 491-492 (Black, J., and DOUGLAS, J., dissenting); *Jacobellis v. Ohio*, *supra*, at 196 (Black, J., joined by DOUGLAS, J., concurring); *Roth*, *supra*, at 508-514 (DOUGLAS, J., dissenting). In this belief, however, MR. JUSTICE DOUGLAS now stands alone.

MR. JUSTICE BRENNAN also emphasizes "institutional stress" in justification of his change of view. Noting that "[t]he number of obscenity cases on our docket gives ample testimony to the burden that has been placed upon this Court," he quite rightly remarks that the examination of contested materials "is hardly a source of edification to the members of this Court." *Paris Adult*

language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' *United States v. Petrillo*, 332 U. S. 1, 7-8. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark ' . . . boundaries sufficiently distinct for judges and juries fairly to administer the law That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .' *Id.*, at 7. See also *United States v. Harriss*, 347 U. S. 612, 624, n. 15; *Boyce Motor Lines, Inc. v. United States*, 342 U. S. 337, 340; *United States v. Ragen*, 314 U. S. 513, 523-524; *United States v. Wurzbach*, 280 U. S. 396; *Hygrade Provision Co. v. Sherman*, 266 U. S. 497; *Fox v. Washington*, 236 U. S. 273; *Nash v. United States*, 229 U. S. 373."

Theatre I v. Slaton, *post*, at 92, 93. He also notes, and we agree, that "uncertainty of the standards creates a continuing source of tension between state and federal courts" "The problem is . . . that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so." *Id.*, at 93, 92.

It is certainly true that the absence, since *Roth*, of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts. But today, for the first time since *Roth* was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate "hard core" pornography from expression protected by the First Amendment. Now we may abandon the casual practice of *Redrup v. New York*, 386 U. S. 767 (1967), and attempt to provide positive guidance to federal and state courts alike.

This may not be an easy road, free from difficulty. But no amount of "fatigue" should lead us to adopt a convenient "institutional" rationale—an absolutist, "anything goes" view of the First Amendment—because it will lighten our burdens.¹¹ "Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees." *Jacobellis v. Ohio*, *supra*, at 187–188 (opinion of BRENNAN, J.). Nor should we remedy "tension between state and federal courts" by arbitrarily depriving the States of a power reserved to them under the Constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day. See *Roth v. United States*, *supra*, at 482–485. "Our duty admits of no 'substitute for facing up

¹¹ We must note, in addition, that any assumption concerning the relative burdens of the past and the probable burden under the standards now adopted is pure speculation.

to the tough individual problems of constitutional judgment involved in every obscenity case.' [*Roth v. United States*, *supra*, at 498]; see *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 488 (opinion of Harlan, J.) [footnote omitted]." *Jacobellis v. Ohio*, *supra*, at 188 (opinion of BRENNAN, J.).

III

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether "the average person, applying contemporary community standards" would consider certain materials "prurient," it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a *national* "community standard" would be an exercise in futility.

As noted before, this case was tried on the theory that the California obscenity statute sought to incorporate the tripartite test of *Memoirs*. This, a "national" standard of First Amendment protection enumerated by a plurality of this Court, was correctly regarded at the time of trial as limiting state prosecution under the controlling case

law. The jury, however, was explicitly instructed that, in determining whether the "dominant theme of the material as a whole . . . appeals to the prurient interest" and in determining whether the material "goes substantially beyond customary limits of candor and affronts contemporary community standards of decency," it was to apply "contemporary community standards of the State of California."

During the trial, both the prosecution and the defense assumed that the relevant "community standards" in making the factual determination of obscenity were those of the State of California, not some hypothetical standard of the entire United States of America. Defense counsel at trial never objected to the testimony of the State's expert on community standards¹² or to the instructions of the trial judge on "statewide" standards. On appeal to the Appellate Department, Superior Court of California, County of Orange, appellant for the first time contended that application of state, rather than national, standards violated the First and Fourteenth Amendments.

We conclude that neither the State's alleged failure to offer evidence of "national standards," nor the trial court's charge that the jury consider state community standards, were constitutional errors. Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable "national standards" when attempting to determine whether certain materials are obscene as a mat-

¹² The record simply does not support appellant's contention, belatedly raised on appeal, that the State's expert was unqualified to give evidence on California "community standards." The expert, a police officer with many years of specialization in obscenity offenses, had conducted an extensive statewide survey and had given expert evidence on 26 occasions in the year prior to this trial. Allowing such expert testimony was certainly not constitutional error. Cf. *United States v. Augenblick*, 393 U. S. 348, 356 (1969).

ter of fact. Mr. Chief Justice Warren pointedly commented in his dissent in *Jacobellis v. Ohio*, *supra*, at 200:

"It is my belief that when the Court said in *Roth* that obscenity is to be defined by reference to 'community standards,' it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable 'national standard' At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one."

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.¹³

¹³ In *Jacobellis v. Ohio*, 378 U. S. 184 (1964), two Justices argued that application of "local" community standards would run the risk of preventing dissemination of materials in some places because sellers would be unwilling to risk criminal conviction by testing variations in standards from place to place. *Id.*, at 193–195 (opinion of BRENNAN, J., joined by Goldberg, J.). The use of "national" standards, however, necessarily implies that materials found tolerable in some places, but not under the "national" criteria, will nevertheless be unavailable where they are acceptable. Thus, in terms of danger to free expression, the potential for suppression seems at least as great in the application of a single nationwide standard as in allowing distribution in accordance with local tastes, a point which Mr. Justice Harlan often emphasized. See *Roth v. United States*, 354 U. S., at 506.

Appellant also argues that adherence to a "national standard" is necessary "in order to avoid unconscionable burdens on the free flow of interstate commerce." As noted *supra*, at 18 n. 1, the application of domestic state police powers in this case did not intrude on any congressional powers under Art. I, § 8, cl. 3, for there is no indication that appellant's materials were ever distributed interstate. Appellant's argument would appear without substance in any event. Obscene material may be validly regulated by a State in the exercise of its traditional local power to protect the

See *Hoyt v. Minnesota*, 399 U. S. 524–525 (1970) (BLACKMUN, J., dissenting); *Walker v. Ohio*, 398 U. S. 434 (1970) (BURGER, C. J., dissenting); *id.*, at 434–435 (Harlan, J., dissenting); *Cain v. Kentucky*, 397 U. S. 319 (1970) (BURGER, C. J., dissenting); *id.*, at 319–320 (Harlan, J., dissenting); *United States v. Groner*, 479 F. 2d, at 581–583; O'Meara & Shaffer, *Obscenity in The Supreme Court: A Note on Jacobellis v. Ohio*, 40 Notre Dame Law. 1, 6–7 (1964). See also *Memoirs v. Massachusetts*, 383 U. S., at 458 (Harlan, J., dissenting); *Jacobellis v. Ohio*, *supra*, at 203–204 (Harlan, J., dissenting); *Roth v. United States*, *supra*, at 505–506 (Harlan, J., concurring and dissenting). People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. As the Court made clear in *Mishkin v. New York*, 383 U. S., at 508–509, the primary concern with requiring a jury to apply the standard of “the average person, applying contemporary community standards” is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one. See *Roth v. United States*, *supra*, at 489. Cf. the now discredited test in *Regina v. Hicklin*, [1868] L. R. 3 Q. B. 360. We hold that the requirement that the jury evaluate the materials with reference to “contemporary

general welfare of its population despite some possible incidental effect on the flow of such materials across state lines. See, e. g., *Head v. New Mexico Board*, 374 U. S. 424 (1963); *Huron Portland Cement Co. v. Detroit*, 362 U. S. 440 (1960); *Breard v. Alexandria*, 341 U. S. 622 (1951); *H. P. Hood & Sons v. Du Mond*, 336 U. S. 525 (1949); *Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1945); *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935); *Sligh v. Kirkwood*, 237 U. S. 52 (1915).

standards of the State of California” serves this protective purpose and is constitutionally adequate.¹⁴

IV

The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a “misuse of the great guarantees of free speech and free press . . .” *Breard v. Alexandria*, 341 U. S., at 645. The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. “The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of

¹⁴ Appellant’s jurisdictional statement contends that he was subjected to “double jeopardy” because a Los Angeles County trial judge dismissed, before trial, a prior prosecution based on the same brochures, but apparently alleging exposures at a different time in a different setting. Appellant argues that once material has been found not to be obscene in one proceeding, the State is “collaterally estopped” from ever alleging it to be obscene in a different proceeding. It is not clear from the record that appellant properly raised this issue, better regarded as a question of procedural due process than a “double jeopardy” claim, in the state courts below. Appellant failed to address any portion of his brief on the merits to this issue, and appellee contends that the question was waived under California law because it was improperly pleaded at trial. Nor is it totally clear from the record before us what collateral effect the pretrial dismissal might have under state law. The dismissal was based, at least in part, on a failure of the prosecution to present affirmative evidence required by state law, evidence which was apparently presented in this case. Appellant’s contention, therefore, is best left to the California courts for further consideration on remand. The issue is not, in any event, a proper subject for appeal. See *Mishkin v. New York*, 383 U. S. 502, 512–514 (1966).

political and social changes desired by the people," *Roth v. United States*, *supra*, at 484 (emphasis added). See *Kois v. Wisconsin*, 408 U. S., at 230–232; *Thornhill v. Alabama*, 310 U. S., at 101–102. But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.¹⁵

There is no evidence, empirical or historical, that the stern 19th century American censorship of public distribution and display of material relating to sex, see *Roth v. United States*, *supra*, at 482–485, in any way limited or affected expression of serious literary, artistic, political, or scientific ideas. On the contrary, it is beyond any question that the era following Thomas Jefferson to Theodore Roosevelt was an "extraordinarily vigorous period," not just in economics and politics, but in *belles lettres* and in "the outlying fields of social and political philosophies."¹⁶ We do not see the harsh hand

¹⁵ In the apt words of Mr. Chief Justice Warren, appellant in this case was "plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide." *Roth v. United States*, *supra*, at 496 (concurring opinion).

¹⁶ See 2 V. Parrington, *Main Currents in American Thought ix et seq.* (1930). As to the latter part of the 19th century, Parrington observed "A new age had come and other dreams—the age and the dreams of a middle-class sovereignty From the crude and vast romanticisms of that vigorous sovereignty emerged eventually a spirit of realistic criticism, seeking to evaluate the worth of this new America, and discover if possible other philosophies to take the place of those which had gone down in the fierce battles of the Civil War." *Id.*, at 474. Cf. 2 S. Morison, H. Commager & W. Leuchtenburg, *The Growth of the American Republic* 197–233 (6th ed. 1969); *Paths of American Thought* 123–166, 203–290 (A. Schlesinger & M. White ed. 1963) (articles of Fleming, Lerner, Morton & Lucia White, E. Rostow, Samuelson, Kazin, Hofstadter); and H. Wish, *Society and Thought in Modern America* 337–386 (1952).

of censorship of ideas—good or bad, sound or unsound—and “repression” of political liberty lurking in every state regulation of commercial exploitation of human interest in sex.

MR. JUSTICE BRENNAN finds “it is hard to see how state-ordered regimentation of our minds can ever be forestalled.” *Paris Adult Theatre I v. Slaton*, post, at 110 (BRENNAN, J., dissenting). These doleful anticipations assume that courts cannot distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material. Moreover, state regulation of hard-core pornography so as to make it unavailable to nonadults, a regulation which MR. JUSTICE BRENNAN finds constitutionally permissible, has all the elements of “censorship” for adults; indeed even more rigid enforcement techniques may be called for with such dichotomy of regulation. See *Interstate Circuit, Inc. v. Dallas*, 390 U. S., at 690.¹⁷ One can concede that the “sexual revolution” of recent years may have had useful byproducts in striking layers of prudery from a subject long irrationally kept from needed ventilation. But it does not follow that no regulation of patently offensive “hard core” materials is needed or permissible; civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine.

In sum, we (a) reaffirm the *Roth* holding that obscene material is not protected by the First Amendment; (b) hold that such material can be regulated by the States, subject to the specific safeguards enunciated

¹⁷ “[W]e have indicated . . . that because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults. *Ginsberg v. New York*, . . . [390 U. S. 629 (1968)].” *Interstate Circuit, Inc. v. Dallas*, 390 U. S. 676, 690 (1968) (footnote omitted).

15

DOUGLAS, J., dissenting

above, without a showing that the material is “utterly without redeeming social value”; and (c) hold that obscenity is to be determined by applying “contemporary community standards,” see *Kois v. Wisconsin*, *supra*, at 230, and *Roth v. United States*, *supra*, at 489, not “national standards.” The judgment of the Appellate Department of the Superior Court, Orange County, California, is vacated and the case remanded to that court for further proceedings not inconsistent with the First Amendment standards established by this opinion. See *United States v. 12 200-ft. Reels of Film*, *post*, at 130 n. 7.

Vacated and remanded.

MR. JUSTICE DOUGLAS, dissenting.

I

Today we leave open the way for California¹ to send a man to prison for distributing brochures that advertise books and a movie under freshly written standards defining obscenity which until today’s decision were never the part of any law.

The Court has worked hard to define obscenity and concededly has failed. In *Roth v. United States*, 354 U. S. 476, it ruled that “[o]bscene material is material which deals with sex in a manner appealing to prurient interest.” *Id.*, at 487. Obscenity, it was said, was rejected by the First Amendment because it is “utterly without redeem-

¹ California defines “obscene matter” as “matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.” Calif. Penal Code § 311 (a).

DOUGLAS, J., dissenting

413 U. S.

ing social importance.” *Id.*, at 484. The presence of a “prurient interest” was to be determined by “contemporary community standards.” *Id.*, at 489. That test, it has been said, could not be determined by one standard here and another standard there, *Jacobellis v. Ohio*, 378 U. S. 184, 194, but “on the basis of a national standard.” *Id.*, at 195. My Brother STEWART in *Jacobellis* commented that the difficulty of the Court in giving content to obscenity was that it was “faced with the task of trying to define what may be indefinable.” *Id.*, at 197.

In *Memoirs v. Massachusetts*, 383 U. S. 413, 418, the *Roth* test was elaborated to read as follows: “[T]hree elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.”

In *Ginzburg v. United States*, 383 U. S. 463, a publisher was sent to prison, not for the kind of books and periodicals he sold, but for the manner in which the publications were advertised. The “leer of the sensualist” was said to permeate the advertisements. *Id.*, at 468. The Court said, “Where the purveyor’s sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity.” *Id.*, at 470. As Mr. Justice Black said in dissent, “. . . Ginzburg . . . is now finally and authoritatively condemned to serve five years in prison for distributing printed matter about sex which neither Ginzburg nor anyone else could possibly have known to be criminal.” *Id.*, at 476. That observation by Mr. Justice Black is underlined by the fact that the *Ginzburg* decision was five to four.

A further refinement was added by *Ginsberg v. New York*, 390 U. S. 629, 641, where the Court held that "it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors."

But even those members of this Court who had created the new and changing standards of "obscenity" could not agree on their application. And so we adopted a *per curiam* treatment of so-called obscene publications that seemed to pass constitutional muster under the several constitutional tests which had been formulated. See *Redrup v. New York*, 386 U. S. 767. Some condemn it if its "dominant tendency might be to 'deprave or corrupt' a reader."² Others look not to the content of the book but to whether it is advertised "'to appeal to the erotic interests of customers.'"³ Some condemn only "hard-core pornography"; but even then a true definition is lacking. It has indeed been said of that definition, "I could never succeed in [defining it] intelligibly," but "I know it when I see it."⁴

Today we would add a new three-pronged test: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Those are the standards we ourselves have written into the Constitution.⁵ Yet how under these vague tests can

² *Roth v. United States*, 354 U. S. 476, 502 (opinion of Harlan, J.).

³ *Ginzburg v. United States*, 383 U. S. 463, 467.

⁴ *Jacobellis v. Ohio*, 378 U. S. 184, 197 (STEWART, J., concurring).

⁵ At the conclusion of a two-year study, the U. S. Commission on

we sustain convictions for the sale of an article prior to the time when some court has declared it to be obscene?

Today the Court retreats from the earlier formulations of the constitutional test and undertakes to make new definitions. This effort, like the earlier ones, is earnest and well intentioned. The difficulty is that we do not deal with constitutional terms, since "obscenity" is not mentioned in the Constitution or Bill of Rights. And the First Amendment makes no such exception from "the press" which it undertakes to protect nor, as I have said on other occasions, is an exception necessarily implied, for there was no recognized exception to the free press at the time the Bill of Rights was adopted which treated "obscene" publications differently from other types of papers, magazines, and books. So there are no constitutional guidelines for deciding what is and what is not "obscene." The Court is at large because we deal with tastes and standards of literature. What shocks me may

Obscenity and Pornography determined that the standards we have written interfere with constitutionally protected materials:

"Society's attempts to legislate for adults in the area of obscenity have not been successful. Present laws prohibiting the consensual sale or distribution of explicit sexual materials to adults are extremely unsatisfactory in their practical application. The Constitution permits material to be deemed 'obscene' for adults only if, as a whole, it appeals to the 'prurient' interest of the average person, is 'patently offensive' in light of 'community standards,' and lacks 'redeeming social value.' These vague and highly subjective aesthetic, psychological and moral tests do not provide meaningful guidance for law enforcement officials, juries or courts. As a result, law is inconsistently and sometimes erroneously applied and the distinctions made by courts between prohibited and permissible materials often appear indefensible. Errors in the application of the law and uncertainty about its scope also cause interference with the communication of constitutionally protected materials." Report of the Commission on Obscenity and Pornography 53 (1970).

be sustenance for my neighbor. What causes one person to boil up in rage over one pamphlet or movie may reflect only his neurosis, not shared by others. We deal here with a regime of censorship which, if adopted, should be done by constitutional amendment after full debate by the people.

Obscenity cases usually generate tremendous emotional outbursts. They have no business being in the courts. If a constitutional amendment authorized censorship, the censor would probably be an administrative agency. Then criminal prosecutions could follow as, if, and when publishers defied the censor and sold their literature. Under that regime a publisher would know when he was on dangerous ground. Under the present regime—whether the old standards or the new ones are used—the criminal law becomes a trap. A brand new test would put a publisher behind bars under a new law improvised by the courts after the publication. That was done in *Ginzburg* and has all the evils of an *ex post facto* law.

My contention is that until a civil proceeding has placed a tract beyond the pale, no criminal prosecution should be sustained. For no more vivid illustration of vague and uncertain laws could be designed than those we have fashioned. As Mr. Justice Harlan has said:

“The upshot of all this divergence in viewpoint is that anyone who undertakes to examine the Court’s decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment.” *Interstate Circuit, Inc. v. Dallas*, 390 U. S. 676, 707.

In *Bowie v. City of Columbia*, 378 U. S. 347, we upset a conviction for remaining on property after being asked to leave, while the only unlawful act charged by the statute was entering. We held that the defendants had received no “fair warning, at the time of their con-

DOUGLAS, J., dissenting

413 U. S.

duct" while on the property "that the act for which they now stand convicted was rendered criminal" by the state statute. *Id.*, at 355. The same requirement of "fair warning" is due here, as much as in *Bowie*. The latter involved racial discrimination; the present case involves rights earnestly urged as being protected by the First Amendment. In any case—certainly when constitutional rights are concerned—we should not allow men to go to prison or be fined when they had no "fair warning" that what they did was criminal conduct.

II

If a specific book, play, paper, or motion picture has in a civil proceeding been condemned as obscene and review of that finding has been completed, and thereafter a person publishes, shows, or displays that particular book or film, then a vague law has been made specific. There would remain the underlying question whether the First Amendment allows an implied exception in the case of obscenity. I do not think it does⁶ and my views

⁶ It is said that "obscene" publications can be banned on authority of restraints on communications incident to decrees restraining unlawful business monopolies or unlawful restraints of trade, *Sugar Institute v. United States*, 297 U. S. 553, 597, or communications respecting the sale of spurious or fraudulent securities. *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 549; *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U. S. 559, 567; *Merrick v. Halsey & Co.*, 242 U. S. 568, 584. The First Amendment answer is that whenever speech and conduct are brigaded—as they are when one shouts "Fire" in a crowded theater—speech can be outlawed. Mr. Justice Black, writing for a unanimous Court in *Giboney v. Empire Storage Co.*, 336 U. S. 490, stated that labor unions could be restrained from picketing a firm in support of a secondary boycott which a State had validly outlawed. Mr. Justice Black said: "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now." *Id.*, at 498.

15

DOUGLAS, J., dissenting

on the issue have been stated over and over again.⁷ But at least a criminal prosecution brought at that juncture would not violate the time-honored void-for-vagueness test.⁸

No such protective procedure has been designed by California in this case. Obscenity—which even we cannot define with precision—is a hodge-podge. To send

⁷ See *United States v. 12 200-ft. Reels of Film*, post, p. 123; *United States v. Orito*, post, p. 139; *Kois v. Wisconsin*, 408 U. S. 229; *Byrne v. Karalex*, 396 U. S. 976, 977; *Ginsberg v. New York*, 390 U. S. 629, 650; *Jacobs v. New York*, 388 U. S. 431, 436; *Ginzburg v. United States*, 383 U. S. 463, 482; *Memoirs v. Massachusetts*, 383 U. S. 413, 424; *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 72; *Times Film Corp. v. Chicago*, 365 U. S. 43, 78; *Smith v. California*, 361 U. S. 147, 167; *Kingsley Pictures Corp. v. Regents*, 360 U. S. 684, 697; *Roth v. United States*, 354 U. S. 476, 508; *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 446; *Superior Films, Inc. v. Department of Education*, 346 U. S. 587, 588; *Gelling v. Texas*, 343 U. S. 960.

⁸ The Commission on Obscenity and Pornography has advocated such a procedure:

"The Commission recommends the enactment, in all jurisdictions which enact or retain provisions prohibiting the dissemination of sexual materials to adults or young persons, of legislation authorizing prosecutors to obtain declaratory judgments as to whether particular materials fall within existing legal prohibitions"

"A declaratory judgment procedure . . . would permit prosecutors to proceed civilly, rather than through the criminal process, against suspected violations of obscenity prohibition. If such civil procedures are utilized, penalties would be imposed for violation of the law only with respect to conduct occurring after a civil declaration is obtained. The Commission believes this course of action to be appropriate whenever there is any existing doubt regarding the legal status of materials; where other alternatives are available, the criminal process should not ordinarily be invoked against persons who might have reasonably believed, in good faith, that the books or films they distributed were entitled to constitutional protection, for the threat of criminal sanctions might otherwise deter the free distribution of constitutionally protected material." Report of the Commission on Obscenity and Pornography 63 (1970).

men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process.

III

While the right to know is the corollary of the right to speak or publish, no one can be forced by government to listen to disclosure that he finds offensive. That was the basis of my dissent in *Public Utilities Comm'n v. Pollak*, 343 U. S. 451, 467, where I protested against making streetcar passengers a "captive" audience. There is no "captive audience" problem in these obscenity cases. No one is being compelled to look or to listen. Those who enter newsstands or bookstalls may be offended by what they see. But they are not compelled by the State to frequent those places; and it is only state or governmental action against which the First Amendment, applicable to the States by virtue of the Fourteenth, raises a ban.

The idea that the First Amendment permits government to ban publications that are "offensive" to some people puts an ominous gloss on freedom of the press. That test would make it possible to ban any paper or any journal or magazine in some benighted place. The First Amendment was designed "to invite dispute," to induce "a condition of unrest," to "create dissatisfaction with conditions as they are," and even to stir "people to anger." *Terminiello v. Chicago*, 337 U. S. 1, 4. The idea that the First Amendment permits punishment for ideas that are "offensive" to the particular judge or jury sitting in judgment is astounding. No greater leveler of speech or literature has ever been designed. To give the power to the censor, as we do today, is to make a sharp and radical break with the traditions of a free society. The First Amendment was not fashioned as a vehicle for

dispensing tranquilizers to the people. Its prime function was to keep debate open to "offensive" as well as to "staid" people. The tendency throughout history has been to subdue the individual and to exalt the power of government. The use of the standard "offensive" gives authority to government that cuts the very vitals out of the First Amendment.⁹ As is intimated by the Court's opinion, the materials before us may be garbage. But so is much of what is said in political campaigns, in the daily press, on TV, or over the radio. By reason of the First Amendment—and solely because of it—speakers and publishers have not been threatened or subdued because their thoughts and ideas may be "offensive" to some.

The standard "offensive" is unconstitutional in yet another way. In *Coates v. City of Cincinnati*, 402 U. S. 611, we had before us a municipal ordinance that made it a crime for three or more persons to assemble on a street and conduct themselves "in a manner annoying to persons

⁹ Obscenity law has had a capricious history:

"The white slave traffic was first exposed by W. T. Stead in a magazine article, 'The Maiden Tribute.' The English law did absolutely nothing to the profiteers in vice, but put Stead in prison for a year for writing about an indecent subject. When the law supplies no definite standard of criminality, a judge in deciding what is indecent or profane may consciously disregard the sound test of present injury, and proceeding upon an entirely different theory may condemn the defendant because his words express ideas which are thought liable to cause bad future consequences. Thus musical comedies enjoy almost unbridled license, while a problem play is often forbidden because opposed to our views of marriage. In the same way, the law of blasphemy has been used against Shelley's *Queen Mab* and the decorous promulgation of pantheistic ideas, on the ground that to attack religion is to loosen the bonds of society and endanger the state. This is simply a roundabout modern method to make heterodoxy in sex matters and even in religion a crime." Z. Chafee, *Free Speech in the United States* 151 (1942).

passing by." We struck it down, saying: "If three or more people meet together on a sidewalk or street corner, they must conduct themselves so as not to annoy any police officer or other person who should happen to pass by. In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.

"Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that no standard of conduct is specified at all." *Id.*, at 614.

How we can deny Ohio the convenience of punishing people who "annoy" others and allow California power to punish people who publish materials "offensive" to some people is difficult to square with constitutional requirements.

If there are to be restraints on what is obscene, then a constitutional amendment should be the way of achieving the end. There are societies where religion and mathematics are the only free segments. It would be a dark day for America if that were our destiny. But the people can make it such if they choose to write obscenity into the Constitution and define it.

We deal with highly emotional, not rational, questions. To many the Song of Solomon is obscene. I do not think we, the judges, were ever given the constitutional power to make definitions of obscenity. If it is to be defined, let the people debate and decide by a constitutional amendment what they want to ban as obscene and what standards they want the legislatures and the courts to apply. Perhaps the people will decide that the path towards a mature, integrated society requires

that all ideas competing for acceptance must have no censor. Perhaps they will decide otherwise. Whatever the choice, the courts will have some guidelines. Now we have none except our own predilections.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

In my dissent in *Paris Adult Theatre I v. Slaton*, post, p. 73, decided this date, I noted that I had no occasion to consider the extent of state power to regulate the distribution of sexually oriented material to juveniles or the offensive exposure of such material to unconsenting adults. In the case before us, appellant was convicted of distributing obscene matter in violation of California Penal Code §311.2, on the basis of evidence that he had caused to be mailed unsolicited brochures advertising various books and a movie. I need not now decide whether a statute might be drawn to impose, within the requirements of the First Amendment, criminal penalties for the precise conduct at issue here. For it is clear that under my dissent in *Paris Adult Theatre I*, the statute under which the prosecution was brought is unconstitutionally overbroad, and therefore invalid on its face.* “[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing ‘attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.’” *Gooding v. Wilson*, 405 U. S. 518, 521 (1972), quoting

*Cal. Penal Code §311.2 (a) provides that “Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor.”

BRENNAN, J., dissenting

413 U.S.

from *Dombrowski v. Pfister*, 380 U. S. 479, 486 (1965). See also *Baggett v. Bullitt*, 377 U. S. 360, 366 (1964); *Coates v. City of Cincinnati*, 402 U. S. 611, 616 (1971); *id.*, at 619–620 (WHITE, J., dissenting); *United States v. Raines*, 362 U. S. 17, 21–22 (1960); *NAACP v. Button*, 371 U. S. 415, 433 (1963). Since my view in *Paris Adult Theatre I* represents a substantial departure from the course of our prior decisions, and since the state courts have as yet had no opportunity to consider whether a “readily apparent construction suggests itself as a vehicle for rehabilitating the [statute] in a single prosecution,” *Dombrowski v. Pfister*, *supra*, at 491, I would reverse the judgment of the Appellate Department of the Superior Court and remand the case for proceedings not inconsistent with this opinion. See *Coates v. City of Cincinnati*, *supra*, at 616.

HEINONLINE

Citation: 491 U.S. 781 1988

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Mon Apr 18 13:00:14 2011

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.

Syllabus

WARD ET AL. *v.* ROCK AGAINST RACISMCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

No. 88-226. Argued February 27, 1989—Decided June 22, 1989

Respondent Rock Against Racism (RAR), furnishing its own sound equipment and technicians, has sponsored yearly programs of rock music at the Naumberg Acoustic Bandshell in New York City's Central Park. The city received numerous complaints about excessive noise at RAR's concerts from users of the nearby Sheep Meadow, an area designated by the city for passive recreation, from other users of the park, and from residents of areas adjacent to the park. Moreover, when the city shut off the power after RAR ignored repeated requests to lower the volume at one of its concerts, the audience became abusive and disruptive. The city also experienced problems at bandshell events put on by other sponsors, who, due to their use of inadequate sound equipment or sound technicians unskilled at mixing sound for the bandshell area, were unable to provide sufficient amplification levels, resulting in disappointed or unruly audiences. Rejecting various other solutions to the excessive noise and inadequate amplification problems, the city adopted a Use Guideline for the bandshell which specified that the city would furnish high quality sound equipment and retain an independent, experienced sound technician for all performances. After the city implemented this guideline, RAR amended a pre-existing District Court complaint against the city to seek damages and a declaratory judgment striking down the guideline as facially invalid under the First Amendment. The court upheld the guideline, finding, *inter alia*, that performers who had used the city's sound system and technician had been uniformly pleased; that, although the city's technician ultimately controlled both sound volume and mix, the city's practice was to give the sponsor autonomy as to mix and to confer with him before turning the volume down; and that the city's amplification system was sufficient for RAR's needs. Applying this Court's three-part test for judging the constitutionality of governmental regulation of the time, place, and manner of protected speech, the court found the guideline valid. The Court of Appeals reversed on the ground that such regulations' method and extent must be the least intrusive upon the freedom of expression as is reasonably necessary to achieve the regulations' purpose, finding that there were various less restrictive means by which the city could control excessive volume without also intruding on RAR's ability to control sound mix.

Held: The city's sound-amplification guideline is valid under the First Amendment as a reasonable regulation of the place and manner of protected speech. Pp. 790–803.

(a) The guideline is content neutral, since it is justified without reference to the content of the regulated speech. The city's principal justification—the desire to control noise in order to retain the sedate character of the Sheep Meadow and other areas of the park and to avoid intrusion into residential areas—has nothing to do with content. The city's other justification, its interest in ensuring sound quality, does not render the guideline content based as an attempt to impose subjective standards of acceptable sound mix on performers, since the city has expressly disavowed any such intent and requires its technician to defer to the sponsor's wishes as to mix. On the record below, the city's sound quality concern extends only to the clearly content-neutral goals of ensuring adequate amplification and avoiding volume problems associated with inadequate mix. There is no merit to RAR's argument that the guideline is nonetheless invalid on its face because it places unbridled discretion in the hands of city enforcement officials. Even granting the doubtful proposition that this claim falls within the narrow class of permissible facial challenges to allegedly unconstrained grants of regulatory authority, the claim nevertheless fails, since the guideline's own terms in effect forbid officials purposely to select an inadequate system or to vary sound quality or volume based on the performer's message. Moreover, the city has applied a narrowing construction to the guideline by requiring officials to defer to sponsors on sound quality and confer with them as to volume problems, and by mandating that amplification be sufficient for the sound to reach all concert ground listeners. Pp. 791–796.

(b) The guideline is narrowly tailored to serve significant governmental interests. That the city has a substantial interest in protecting citizens from unwelcome and excessive noise, even in a traditional public forum such as the park, cannot be doubted. Moreover, it has a substantial interest in ensuring the sufficiency of sound amplification at bandshell events in order to allow citizens to enjoy the benefits of the park, in light of the evidence that inadequate amplification had resulted in the inability of some audiences to hear performances. The Court of Appeals erred in requiring the city to prove that the guideline was the least intrusive means of furthering these legitimate interests, since a “less-restrictive-alternative analysis” has never been—and is here, again, specifically rejected as—a part of the inquiry into the validity of a time, place, or manner regulation. See *Clark v. Community for Creative Non-Violence*, 468 U. S. 288, 293; *Regan v. Time, Inc.*, 468 U. S. 641. The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be

achieved less effectively absent the regulation, and the means chosen are not substantially broader than necessary to achieve that interest. If these standards are met, courts should defer to the government's reasonable determination. Here, the city's substantial interest in limiting sound volume is served in a direct and effective way by the requirement that its technician control the mixing board. Absent this requirement, the city's interest would have been served less well, as is evidenced by the excessive noise complaints generated by RAR's past concerts. The city also could reasonably have determined that, overall, its interest in ensuring that sound amplification was sufficient to reach all concert ground listeners would be served less effectively without the guideline than with it, since, by providing competent technicians and adequate equipment, the city eliminated inadequate amplification problems that plagued some performers in the past. Furthermore, in the absence of evidence that the guideline had a substantial deleterious effect on the ability of performers to achieve the quality of sound they desired, there is no merit to RAR's contention that the guideline is substantially broader than necessary to achieve the city's legitimate ends. Pp. 796–802.

(c) The guideline leaves open ample alternative channels of communication, since it does not attempt to ban any particular manner or type of expression at a given place and time. Rather, it continues to permit expressive activity in the bandshell and has no effect on the quantity or content of that expression beyond regulating the extent of amplification. That the city's volume limitations may reduce to some degree the potential audience for RAR's speech is of no consequence, since there has been no showing that the remaining avenues of communication are inadequate. Pp. 802–803.

848 F. 2d 367, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and SCALIA, JJ., joined. BLACKMUN, J., concurred in the result. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and STEVENS, JJ., joined, *post*, p. 803.

Leonard J. Koerner argued the cause for petitioners. With him on the brief were *Peter L. Zimroth*, *Larry A. Sonnenshein*, and *Julian L. Kalkstein*.

William M. Kunstler argued the cause for respondent. With him on the brief was *Noah A. Kinigstein*.*

*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried*, *Assistant Attorney General Bolton*, *Deputy*

JUSTICE KENNEDY delivered the opinion of the Court.

In the southeast portion of New York City's Central Park, about 10 blocks upward from the park's beginning point at 59th Street, there is an amphitheater and stage structure known as the Naumberg Acoustic Bandshell. The bandshell faces west across the remaining width of the park. In close proximity to the bandshell, and lying within the directional path of its sound, is a grassy open area called the Sheep Meadow. The city has designated the Sheep Meadow as a quiet area for passive recreations like reclining, walking, and reading. Just beyond the park, and also within the potential sound range of the bandshell, are the apartments and residences of Central Park West.

This case arises from the city's attempt to regulate the volume of amplified music at the bandshell so the performances are satisfactory to the audience without intruding upon those who use the Sheep Meadow or live on Central Park West and in its vicinity.

The city's regulation requires bandshell performers to use sound-amplification equipment and a sound technician provided by the city. The challenge to this volume control technique comes from the sponsor of a rock concert. The trial court sustained the noise control measures, but the Court of Appeals for the Second Circuit reversed. We granted certiorari to resolve the important First Amendment issues presented by the case.

I

Rock Against Racism, respondent in this case, is an unincorporated association which, in its own words, is "dedicated to the espousal and promotion of antiracist views." App. to Pet. for Cert. 3. Each year from 1979 through 1986, RAR has sponsored a program of speeches and rock music at the

Solicitor General Ayer, Stephen L. Nightingale, and John F. Cordes; and for the National League of Cities by Benna Ruth Solomon, Joyce Holmes Benjamin, and Ogden N. Lewis.

bandshell. RAR has furnished the sound equipment and sound technician used by the various performing groups at these annual events.

Over the years, the city received numerous complaints about excessive sound amplification at respondent's concerts from park users and residents of areas adjacent to the park. On some occasions RAR was less than cooperative when city officials asked that the volume be reduced; at one concert, police felt compelled to cut off the power to the sound system, an action that caused the audience to become unruly and hostile. App. 127–131, 140–141, 212–214, 345–347.

Before the 1984 concert, city officials met with RAR representatives to discuss the problem of excessive noise. It was decided that the city would monitor sound levels at the edge of the concert ground, and would revoke respondent's event permit if specific volume limits were exceeded. Sound levels at the concert did exceed acceptable levels for sustained periods of time, despite repeated warnings and requests that the volume be lowered. Two citations for excessive volume were issued to respondent during the concert. When the power was eventually shut off, the audience became abusive and disruptive.

The following year, when respondent sought permission to hold its upcoming concert at the bandshell, the city declined to grant an event permit, citing its problems with noise and crowd control at RAR's previous concerts. The city suggested some other city-owned facilities as alternative sites for the concert. RAR declined the invitation and filed suit in United States District Court against the city, its mayor, and various police and parks department officials, seeking an injunction directing issuance of an event permit. After respondent agreed to abide by all applicable regulations, the parties reached agreement and a permit was issued.

The city then undertook to develop comprehensive New York City Parks Department Use Guidelines for the Naumberg Bandshell. A principal problem to be addressed by

the guidelines was controlling the volume of amplified sound at bandshell events. A major concern was that at some bandshell performances the event sponsors had been unable to “provide the amplification levels required and ‘crowds unhappy with the sound became disappointed or unruly.’” Brief for Petitioners 9. The city found that this problem had several causes, including inadequate sound equipment, sound technicians who were either unskilled at mixing sound outdoors or unfamiliar with the acoustics of the bandshell and its surroundings, and the like. Because some performers compensated for poor sound mix by raising volume, these factors tended to exacerbate the problem of excess noise.¹ App. 30, 189, 218–219.

The city considered various solutions to the sound-amplification problem. The idea of a fixed decibel limit for all performers using the bandshell was rejected because the impact on listeners of a single decibel level is not constant, but varies in response to changes in air temperature, foliage, audience size, and like factors. *Id.*, at 31, 220, 285–286. The city also rejected the possibility of employing a sound technician to operate the equipment provided by the various sponsors of bandshell events, because the city’s technician might have had difficulty satisfying the needs of sponsors while operating unfamiliar, and perhaps inadequate, sound equipment. *Id.*,

¹The amplified sound heard at a rock concert consists of two components, volume and mix. Sound produced by the various instruments and performers on stage is picked up by microphones and fed into a central mixing board, where it is combined into one signal and then amplified through speakers to the audience. A sound technician is at the mixing board to select the appropriate mix, or balance, of the various sounds produced on stage, and to add other effects as desired by the performers. In addition to controlling the sound mix, the sound technician also controls the overall volume of sound reaching the audience. During the course of a performance, the sound technician is continually manipulating various controls on the mixing board to provide the desired sound mix and volume. The sound technician thus plays an important role in determining the quality of the amplified sound that reaches the audience.

at 220. Instead, the city concluded that the most effective way to achieve adequate but not excessive sound amplification would be for the city to furnish high quality sound equipment and retain an independent, experienced sound technician for all performances at the bandshell. After an extensive search the city hired a private sound company capable of meeting the needs of all the varied users of the bandshell.

The Use Guidelines were promulgated on March 21, 1986.² After learning that it would be expected to comply with the guidelines at its upcoming annual concert in May 1986, respondent returned to the District Court and filed a motion for an injunction against the enforcement of certain aspects of the guidelines. The District Court preliminarily enjoined enforcement of the sound-amplification rule on May 1, 1986. See 636 F. Supp. 178 (SDNY 1986). Under the protection of the injunction, and alone among users of the bandshell in the 1986 season, RAR was permitted to use its own sound equip-

² In pertinent part, the Use Guidelines provide:

"SOUND AMPLIFICATION

"To provide the best sound for all events Department of Parks and Recreation has leased a sound amplification system designed for the specific demands of the Central Park Bandshell. To insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of Sheep Meadow, all sponsors may use only the Department of Parks and Recreation sound system. DEPARTMENT OF PARKS AND RECREATION IS TO BE THE SOLE AND ONLY PROVIDER OF SOUND AMPLIFICATION, INCLUDING THOUGH NOT LIMITED TO AMPLIFIERS, SPEAKERS, MONITORS, MICROPHONES, AND PROCESSORS.

"Clarity of sound results from a combination of amplification equipment and a sound technician's familiarity and proficiency with that system. Department of Parks and Recreation will employ a professional sound technician [who] will be fully versed in sound bounce patterns, daily air currents, and sound skipping within the Park. The sound technician must also consider the Bandshell's proximity to Sheep Meadow, activities at Bethesda Terrace, and the New York City Department of Environmental Protection recommendations." App. 375-376.

ment and technician, just as it had done in prior years. RAR's 1986 concert again generated complaints about excessive noise from park users and nearby residents. App. 127, 138.

After the concert, respondent amended its complaint to seek damages and a declaratory judgment striking down the guidelines as facially invalid. After hearing five days of testimony about various aspects of the guidelines, the District Court issued its decision upholding the sound-amplification guideline.³ The court found that the city had been "motivated by a desire to obtain top-flight sound equipment and experienced operators" in selecting an independent contractor to provide the equipment and technician for bandshell events, and that the performers who did use the city's sound system in the 1986 season, in performances "which ran the full cultural gamut from grand opera to salsa to reggae," were uniformly pleased with the quality of the sound provided. 658 F. Supp. 1346, 1352 (SDNY 1987).

Although the city's sound technician controlled both sound volume and sound mix by virtue of his position at the mixing board, the court found that "[t]he City's practice for events at the Bandshell is to give the sponsor autonomy with respect to the sound mix: balancing treble with bass, highlighting a particular instrument or voice, and the like," and that the city's sound technician "does all he can to accommodate the sponsor's desires in those regards." *Ibid.* Even with respect to volume control, the city's practice was to confer with the sponsor before making any decision to turn the volume down. *Ibid.* In some instances, as with a New York Grand Opera performance, the sound technician accommodated the performers' unique needs by integrating special microphones with the city's equipment. The court specifically found that "[t]he City's implementation of the Bandshell guidelines provides for a sound amplification system capable of meeting

³The court invalidated certain other aspects of the Use Guidelines, but those provisions are not before us.

RAR's technical needs and leaves control of the sound 'mix' in the hands of RAR." *Id.*, at 1353. Applying this Court's three-part test for judging the constitutionality of government regulation of the time, place, or manner of protected speech, the court found the city's regulation valid.

The Court of Appeals reversed. 848 F. 2d 367 (CA2 1988). After recognizing that "[c]ontent neutral time, place and manner regulations are permissible so long as they are narrowly tailored to serve a substantial government interest and do not unreasonably limit alternative avenues of expression," the court added the proviso that "the method and extent of such regulation must be reasonable, that is, it must be the least intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation." *Id.*, at 370 (citing *United States v. O'Brien*, 391 U. S. 367, 377 (1968)). Applying this test, the court determined that the city's guideline was valid only to the extent necessary to achieve the city's legitimate interest in controlling excessive volume, but found there were various alternative means of controlling volume without also intruding on respondent's ability to control the sound mix. For example, the city could have directed respondent's sound technician to keep the volume below specified levels. Alternatively, a volume-limiting device could have been installed; and as a "last resort," the court suggested, "the plug can be pulled on the sound to enforce the volume limit." 848 F. 2d, at 372, n. 6. In view of the potential availability of these seemingly less restrictive alternatives, the Court of Appeals concluded that the sound-amplification guideline was invalid because the city had failed to prove that its regulation "was the least intrusive means of regulating the volume." *Id.*, at 371.

We granted certiorari, 488 U. S. 816 (1988), to clarify the legal standard applicable to governmental regulation of the time, place, or manner of protected speech. Because the Court of Appeals erred in requiring the city to prove that its regulation was the least intrusive means of furthering its le-

gitimate governmental interests, and because the ordinance is valid on its face, we now reverse.

II

Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. See 2 Dialogues of Plato, Republic, bk. 3, pp. 231, 245–248 (B. Jowett transl., 4th ed. 1953) ("Our poets must sing in another and a nobler strain"); Musical Freedom and Why Dictators Fear It, N. Y. Times, Aug. 23, 1981, section 2, p. 1, col. 5; Soviet Schizophrenia toward Stravinsky, N. Y. Times, June 26, 1982, section 1, p. 25, col. 2; Symphonic Voice from China Is Heard Again, N. Y. Times, Oct. 11, 1987, section 2, p. 27, col. 1. The Constitution prohibits any like attempts in our own legal order. Music, as a form of expression and communication, is protected under the First Amendment. In the case before us the performances apparently consisted of remarks by speakers, as well as rock music, but the case has been presented as one in which the constitutional challenge is to the city's regulation of the musical aspects of the concert; and, based on the principle we have stated, the city's guideline must meet the demands of the First Amendment. The parties do not appear to dispute that proposition.

We need not here discuss whether a municipality which owns a bandstand or stage facility may exercise, in some circumstances, a proprietary right to select performances and control their quality. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546, 570–574 (1975) (REHNQUIST, J., dissenting). Though it did demonstrate its own interest in the effort to insure high quality performances by providing the equipment in question, the city justifies its guideline as a regulatory measure to limit and control noise. Here the bandshell was open, apparently, to all performers; and we de-

cide the case as one in which the bandshell is a public forum for performances in which the government's right to regulate expression is subject to the protections of the First Amendment. *United States v. Grace*, 461 U. S. 171, 177 (1983); see *Frisby v. Schultz*, 487 U. S. 474, 481 (1988); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983). Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468 U. S. 288, 293 (1984); see *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U. S. 640, 648 (1981) (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771 (1976)). We consider these requirements in turn.

A

The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. *Community for Creative Non-Violence*, *supra*, at 295. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. See *Renton v. Playtime Theatres, Inc.*, 475 U. S. 41, 47–48 (1986). Government regulation of expressive activity is content neutral so long as it is "*justified* without reference to the content of the regulated speech." *Community for Creative Non-Violence*, *supra*, at 293 (emphasis added); *Heffron*, *supra*, at 648 (quoting *Virginia Pharmacy Bd.*, *supra*, at

771); see *Boos v. Barry*, 485 U. S. 312, 320–321 (1988) (opinion of O’CONNOR, J.).

The principal justification for the sound-amplification guideline is the city’s desire to control noise levels at bandshell events, in order to retain the character of the Sheep Meadow and its more sedate activities, and to avoid undue intrusion into residential areas and other areas of the park. This justification for the guideline “ha[s] nothing to do with content,” *Boos v. Barry*, *supra*, at 320, and it satisfies the requirement that time, place, or manner regulations be content neutral.

The only other justification offered below was the city’s interest in “ensur[ing] the quality of sound at Bandshell events.” 658 F. Supp., at 1352; see 848 F. 2d, at 370, n. 3. Respondent urges that this justification is not content neutral because it is based upon the quality, and thus the content, of the speech being regulated. In respondent’s view, the city is seeking to assert artistic control over performers at the bandshell by enforcing a bureaucratically determined, value-laden conception of good sound. That all performers who have used the city’s sound equipment have been completely satisfied is of no moment, respondent argues, because “[t]he First Amendment does not permit and cannot tolerate state control of artistic expression merely because the State claims that [its] efforts will lead to ‘top-quality’ results.” Brief for Respondent 19.

While respondent’s arguments that the government may not interfere with artistic judgment may have much force in other contexts, they are inapplicable to the facts of this case. The city has disclaimed in express terms any interest in imposing its own view of appropriate sound mix on performers. To the contrary, as the District Court found, the city requires its sound technician to defer to the wishes of event sponsors concerning sound mix. 658 F. Supp., at 1352–1353. On this record, the city’s concern with sound quality extends only to the clearly content-neutral goals of ensuring adequate

sound amplification and avoiding the volume problems associated with inadequate sound mix.⁴ Any governmental attempt to serve purely esthetic goals by imposing subjective standards of acceptable sound mix on performers would raise serious First Amendment concerns, but this case provides us with no opportunity to address those questions. As related above, the District Court found that the city's equipment and its sound technician could meet all of the standards requested by the performers, including RAR.

Respondent argues further that the guideline, even if not content based in explicit terms, is nonetheless invalid on its face because it places unbridled discretion in the hands of city officials charged with enforcing it. See *Lakewood v. Plain Dealer Publishing Co.*, 486 U. S. 750, 769–772 (1988) (4-to-3 decision); *Heffron v. International Society for Krishna Consciousness, Inc.*, *supra*, at 649; *Freedman v. Maryland*, 380 U. S. 51, 56 (1965); *Thornhill v. Alabama*, 310 U. S. 88, 97 (1940). According to respondent, there is nothing in the language of the guideline to prevent city officials from selecting wholly inadequate sound equipment or technicians, or even from varying the volume and quality of sound based on the message being conveyed by the performers.

As a threshold matter, it is far from clear that respondent should be permitted to bring a facial challenge to this aspect of the regulation. Our cases permitting facial challenges to regulations that allegedly grant officials unconstrained authority to regulate speech have generally involved licensing schemes that “ves[t] unbridled discretion in a government official over whether to permit or deny expressive activity.” *Plain Dealer, supra*, at 755. The grant of discretion that re-

⁴ As noted above, there is evidence to suggest that volume control and sound mix are interrelated to a degree, in that performers unfamiliar with the acoustics of the bandshell sometimes attempt to compensate for poor sound mix by increasing volume. App. 218, 290–291. By providing adequate sound equipment and professional sound mixing, the city avoids this problem.

spondent seeks to challenge here is of an entirely different, and lesser, order of magnitude, because respondent does not suggest that city officials enjoy unfettered discretion to deny bandshell permits altogether. Rather, respondent contends only that the city, by exercising what is concededly its right to regulate amplified sound, could choose to provide inadequate sound for performers based on the content of their speech. Since respondent does not claim that city officials enjoy unguided discretion to deny the right to speak altogether, it is open to question whether respondent's claim falls within the narrow class of permissible facial challenges to allegedly unconstrained grants of regulatory authority. Cf. 486 U. S., at 787 (WHITE, J., dissenting) (arguing that facial challenges of this type are permissible only where "the local law at issue require[s] licenses—not for a narrow category of expressive conduct that could be prohibited—but for a sweeping range of First Amendment protected activity").

We need not decide, however, whether the "extraordinary doctrine" that permits facial challenges to some regulations of expression, see *id.*, at 772 (WHITE, J., dissenting), should be extended to the circumstances of this case, for respondent's facial challenge fails on its merits. The city's guideline states that its goals are to "provide the best sound for all events" and to "insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of [the] Sheep Meadow." App. 375. While these standards are undoubtedly flexible, and the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity. See *Grayned v. City of Rockford*, 408 U. S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty in our language"); see also *Kovacs v. Cooper*, 336 U. S. 77, 79 (1949) (rejecting vagueness challenge to city ordinance forbidding "loud and raucous" sound amplification) (opinion of Reed, J.). By its own terms the

city's sound-amplification guideline must be interpreted to forbid city officials purposely to select inadequate sound systems or to vary the sound quality or volume based on the message being delivered by performers. The guideline is not vulnerable to respondent's facial challenge.⁵

Even if the language of the guideline were not sufficient on its face to withstand challenge, our ultimate conclusion would be the same, for the city has interpreted the guideline in such a manner as to provide additional guidance to the officials charged with its enforcement. The District Court expressly found that the city's policy is to defer to the sponsor's desires concerning sound quality. 658 F. Supp., at 1352. With respect to sound volume, the city retains ultimate control, but city officials "mak[e] it a practice to confer with the sponsor if any questions of excessive sound arise, before taking any corrective action." *Ibid.* The city's goal of ensuring that "the sound amplification [is] sufficient to reach all listeners within the defined concertground," *ibid.*, serves to limit further the discretion of the officials on the scene. Administrative interpretation and implementation of a regulation are, of course, highly relevant to our analysis, for "[i]n evaluating a facial

⁵The dissent's suggestion that the guideline constitutes a prior restraint is not consistent with our cases. See *post*, at 808–809. As we said in *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546 (1975), the regulations we have found invalid as prior restraints have "had this in common: they gave public officials the power to deny use of a forum in advance of actual expression." *Id.*, at 553. The sound-amplification guideline, by contrast, grants no authority to forbid speech, but merely permits the city to regulate volume to the extent necessary to avoid excessive noise. It is true that the city's sound technician theoretically possesses the power to shut off the volume for any particular performer, but that hardly distinguishes this regulatory scheme from any other; government will *always* possess the raw power to suppress speech through force, and indeed it was in part to avoid the necessity of exercising its power to "pull the plug" on the volume that the city adopted the sound-amplification guideline. The relevant question is whether the challenged regulation *authorizes* suppression of speech in advance of its expression, and the sound-amplification guideline does not.

challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.” *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 494, n. 5 (1982); see *Plain Dealer*, 486 U. S., at 769–770, and n. 11; *United States v. Grace*, 461 U. S., at 181, n. 10; *Grayned v. City of Rockford*, *supra*, at 110; *Poulos v. New Hampshire*, 345 U. S. 395 (1953). Any inadequacy on the face of the guideline would have been more than remedied by the city’s narrowing construction.

B

The city’s regulation is also “narrowly tailored to serve a significant governmental interest.” *Community for Creative Non-Violence*, 468 U. S., at 293. Despite respondent’s protestations to the contrary, it can no longer be doubted that government “ha[s] a substantial interest in protecting its citizens from unwelcome noise.” *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789, 806 (1984) (citing *Kovacs v. Cooper*, *supra*); see *Grayned*, *supra*, at 116. This interest is perhaps at its greatest when government seeks to protect “the well-being, tranquility, and privacy of the home,” *Frisby v. Schultz*, 487 U. S., at 484 (quoting *Carey v. Brown*, 447 U. S. 455, 471 (1980)), but it is by no means limited to that context, for the government may act to protect even such traditional public forums as city streets and parks from excessive noise. *Kovacs v. Cooper*, 336 U. S., at 86–87 (opinion of Reed, J.); *id.*, at 96–97 (Frankfurter, J., concurring); *id.*, at 97 (Jackson, J., concurring); see *Community for Creative Non-Violence*, *supra*, at 296 (recognizing the government’s “substantial interest in maintaining the parks . . . in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them”).

We think it also apparent that the city’s interest in ensuring the sufficiency of sound amplification at bandshell events is a substantial one. The record indicates that inadequate

sound amplification has had an adverse affect on the ability of some audiences to hear and enjoy performances at the bandshell. The city enjoys a substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer, from amplified music to silent meditation. See *Community for Creative Non-Violence, supra*, at 296.

The Court of Appeals recognized the city's substantial interest in limiting the sound emanating from the bandshell. See 848 F. 2d, at 370. The court concluded, however, that the city's sound-amplification guideline was not narrowly tailored to further this interest, because "it has not [been] shown . . . that the requirement of the use of the city's sound system and technician was the *least intrusive means* of regulating the volume." *Id.*, at 371 (emphasis added). In the court's judgment, there were several alternative methods of achieving the desired end that would have been less restrictive of respondent's First Amendment rights.

The Court of Appeals erred in sifting through all the available or imagined alternative means of regulating sound volume in order to determine whether the city's solution was "the least intrusive means" of achieving the desired end. This "less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation." *Regan v. Time, Inc.*, 468 U. S. 641, 657 (1984) (opinion of WHITE, J.). Instead, our cases quite clearly hold that restrictions on the time, place, or manner of protected speech are not invalid "simply because there is some imaginable alternative that might be less burdensome on speech." *United States v. Albertini*, 472 U. S. 675, 689 (1985).

The Court of Appeals apparently drew its least-intrusive-means requirement from *United States v. O'Brien*, 391 U. S., at 377, the case in which we established the standard for judging the validity of restrictions on expressive conduct. See 848 F. 2d, at 370. The court's reliance was misplaced,

however, for we have held that the *O'Brien* test “in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.” *Community for Creative Non-Violence, supra*, at 298. Indeed, in *Community for Creative Non-Violence*, we squarely rejected reasoning identical to that of the court below:

“We are unmoved by the Court of Appeals’ view that the challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest in preserving park lands. . . . We do not believe . . . that either *United States v. O'Brien* or the time, place, or manner decisions assign to the judiciary the authority to replace the [parks department] as the manager of the [city’s] parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.” 468 U. S., at 299.

Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government’s legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so.⁶

⁶ Respondent contends that our decision last Term in *Boos v. Barry*, 485 U. S. 312 (1988), supports the conclusion that “a regulation is neither precisely drawn nor ‘narrowly tailored’ if less intrusive means than those employed are available.” Brief for Respondent 27. In *Boos* we concluded that the government regulation at issue was “not narrowly tailored; a less restrictive alternative is readily available.” 485 U. S., at 329 (citing *Wygant v. Jackson Bd. of Ed.*, 476 U. S. 267, 280, n. 6 (1986) (plurality opinion)). In placing reliance on *Boos*, however, respondent ignores a crucial difference between that case and this. The regulation we invalidated in *Boos* was a content-based ban on displaying signs critical of foreign governments; such content-based restrictions on political speech “must be subjected to the most exacting scrutiny.” 485 U. S., at 321. While time, place, or manner regulations must also be “narrowly tailored” in order to survive First Amendment challenge, we have never applied strict scrutiny

Rather, the requirement of narrow tailoring is satisfied “so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” *United States v. Albertini*, *supra*, at 689; see also *Community for Creative Non-Violence*, *supra*, at 297. To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government’s legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.⁷ See *Frisby*

in this context. As a result, the same degree of tailoring is not required of these regulations, and least-restrictive-alternative analysis is wholly out of place. For the same reason, the dissent’s citation of *Richmond v. J. A. Croson Co.*, 488 U. S. 469 (1989), is beside the point. See *post*, at 806, n. 4. *Croson*, like *Boos*, is a strict-scrutiny case; even the dissent does not argue that strict scrutiny is applicable to time, place, or manner regulations.

Our summary affirmance of *Watseka v. Illinois Public Action Council*, 796 F. 2d 1547 (CA7 1986), *aff’d*, 479 U. S. 1048 (1987), is not to the contrary. Although the Seventh Circuit in that case did adopt the least-restrictive-alternative approach, see 796 F. 2d, at 1553–1554, its judgment was also supported by the alternative grounds that the regulation at issue did not serve to further the stated governmental interests and did not leave open alternative channels of communication. *Id.*, at 1555–1558. As we have noted on more than one occasion: “A summary disposition affirms only the judgment of the court below, and no more may be read into our action than was essential to sustain that judgment.” *Anderson v. Celebrezze*, 460 U. S. 780, 785, n. 5 (1983).

⁷The dissent’s attempt to analogize the sound-amplification guideline to a total ban on distribution of handbills is imaginative but misguided. See *post*, at 806–807. The guideline does not ban all concerts, or even all rock concerts, but instead focuses on the source of the evils the city seeks to eliminate—excessive and inadequate sound amplification—and eliminates them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils. This is the essence of narrow tailoring. A ban on handbilling, of course, would suppress a great quantity of speech that does not cause the evils that it seeks to eliminate, whether they be fraud, crime, litter, traffic congestion, or noise. See *Martin v. Struthers*, 319 U. S. 141, 145–146 (1943). For that

v. *Schultz*, 487 U. S., at 485 (“A complete ban can be narrowly tailored but only if each activity within the proscription’s scope is an appropriately targeted evil”). So long as the means chosen are not substantially broader than necessary to achieve the government’s interest, however, the regulation will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-restrictive alternative. “The validity of [time, place, or manner] regulations does not turn on a judge’s agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests” or the degree to which those interests should be promoted. *United States v. Albertini*, 472 U. S., at 689; see *Community for Creative Non-Violence*, *supra*, at 299.

It is undeniable that the city’s substantial interest in limiting sound volume is served in a direct and effective way by the requirement that the city’s sound technician control the mixing board during performances. Absent this requirement, the city’s interest would have been served less well, as is evidenced by the complaints about excessive volume generated by respondent’s past concerts. The alternative regulatory methods hypothesized by the Court of Appeals reflect nothing more than a disagreement with the city over how much control of volume is appropriate or how that level of control is to be achieved. See *Community for Creative Non-Violence*, *supra*, at 299. The Court of Appeals erred in failing to defer to the city’s reasonable determination that its interest in controlling volume would be best served by requiring bandshell performers to utilize the city’s sound technician.

The city’s second content-neutral justification for the guideline, that of ensuring “that the sound amplification [is] sufficient to reach all listeners within the defined concert-

reason, a complete ban on handbilling would be substantially broader than necessary to achieve the interests justifying it.

ground," 658 F. Supp., at 1352, also supports the city's choice of regulatory methods. By providing competent sound technicians and adequate amplification equipment, the city eliminated the problems of inexperienced technicians and insufficient sound volume that had plagued some bandshell performers in the past. No doubt this concern is not applicable to respondent's concerts, which apparently were characterized by more-than-adequate sound amplification. But that fact is beside the point, for the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case. Here, the regulation's effectiveness must be judged by considering all the varied groups that use the bandshell, and it is valid so long as the city could reasonably have determined that its interests overall would be served less effectively without the sound-amplification guideline than with it. *United States v. Albertini*, *supra*, at 688-689; *Community for Creative Non-Violence*, 468 U. S., at 296-297. Considering these proffered justifications together, therefore, it is apparent that the guideline directly furthers the city's legitimate governmental interests and that those interests would have been less well served in the absence of the sound-amplification guideline.

Respondent nonetheless argues that the sound-amplification guideline is not narrowly tailored because, by placing control of sound mix in the hands of the city's technician, the guideline sweeps far more broadly than is necessary to further the city's legitimate concern with sound volume. According to respondent, the guideline "targets . . . more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, *supra*, at 485.

If the city's regulatory scheme had a substantial deleterious effect on the ability of bandshell performers to achieve the quality of sound they desired, respondent's concerns would have considerable force. The District Court found,

however, that pursuant to city policy, the city's sound technician "give[s] the sponsor autonomy with respect to the sound mix . . . [and] does all that he can to accommodate the sponsor's desires in those regards." 658 F. Supp., at 1352. The court squarely rejected respondent's claim that the city's "technician is not able properly to implement a sponsor's instructions as to sound quality or mix," finding that "[n]o evidence to that effect was offered at trial; as noted, the evidence is to the contrary." App. to Pet. for Cert. 89. In view of these findings, which were not disturbed by the Court of Appeals, we must conclude that the city's guideline has no material impact on any performer's ability to exercise complete artistic control over sound quality. Since the guideline allows the city to control volume without interfering with the performer's desired sound mix, it is not "substantially broader than necessary" to achieve the city's legitimate ends, *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S., at 808, and thus it satisfies the requirement of narrow tailoring.

C

The final requirement, that the guideline leave open ample alternative channels of communication, is easily met. Indeed, in this respect the guideline is far less restrictive than regulations we have upheld in other cases, for it does not attempt to ban any particular manner or type of expression at a given place or time. Cf. *Frisby, supra*, at 482-484; *Community for Creative Non-Violence, supra*, at 295; *Renton v. Playtime Theatres, Inc.*, 475 U. S., at 53-54. Rather, the guideline continues to permit expressive activity in the bandshell, and has no effect on the quantity or content of that expression beyond regulating the extent of amplification. That the city's limitations on volume may reduce to some degree the potential audience for respondent's speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate. See *Taxpay-*

781

MARSHALL, J., dissenting

ers for Vincent, *supra*, at 803, and n. 23, 812, and n. 30; Kovacs, 336 U. S., at 88–89 (opinion of Reed, J.).

III

The city's sound-amplification guideline is narrowly tailored to serve the substantial and content-neutral governmental interests of avoiding excessive sound volume and providing sufficient amplification within the bandshell concert ground, and the guideline leaves open ample channels of communication. Accordingly, it is valid under the First Amendment as a reasonable regulation of the place and manner of expression. The judgment of the Court of Appeals is

Reversed.

JUSTICE BLACKMUN concurs in the result.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN and JUSTICE STEVENS join, dissenting.

No one can doubt that government has a substantial interest in regulating the barrage of excessive sound that can plague urban life. Unfortunately, the majority plays to our shared impatience with loud noise to obscure the damage that it does to our First Amendment rights. Until today, a key safeguard of free speech has been government's obligation to adopt the least intrusive restriction necessary to achieve its goals. By abandoning the requirement that time, place, and manner regulations must be narrowly tailored, the majority replaces constitutional scrutiny with mandatory deference. The majority's willingness to give government officials a free hand in achieving their policy ends extends so far as to permit, in this case, government control of speech in advance of its dissemination. Because New York City's Use Guidelines (Guidelines) are not narrowly tailored to serve its interest in regulating loud noise, and because they constitute an impermissible prior restraint, I dissent.

I

The majority sets forth the appropriate standard for assessing the constitutionality of the Guidelines. A time, place, and manner regulation of expression must be content neutral, serve a significant government interest, be narrowly tailored to serve that interest, and leave open ample alternative channels of communication. See *Frisby v. Schultz*, 487 U. S. 474, 481–482 (1988); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U. S. 37, 44 (1983). The Guidelines indisputably are content neutral as they apply to all bandshell users irrespective of the message of their music. App. 375; see *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U. S. 1, 20 (1985).¹ They also serve government's significant interest in limiting loud noise in public places, see *Grayned v. Rockford*, 408 U. S. 104, 116 (1972), by giving the city exclusive control of all sound equipment.

My complaint is with the majority's serious distortion of the narrow tailoring requirement. Our cases have not, as the majority asserts, "clearly" rejected a less-restrictive-alternative test. *Ante*, at 797. On the contrary, just last Term, we held that a statute is narrowly tailored only "if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, *supra*, at 485. While there is language in a few opinions which, taken out of

¹The majority's reliance on *Renton v. Playtime Theatres, Inc.*, 475 U. S. 41 (1986), is unnecessary and unwise. That decision dealt only with the unique circumstances of "businesses that purvey sexually explicit materials," *Id.*, at 49, and n. 2. Today, for the first time, a majority of the Court applies *Renton* analysis to a category of speech far afield from that decision's original limited focus. Given the serious threat to free expression posed by *Renton* analysis, see *Boos v. Barry*, 485 U. S. 312, 335–337 (1988) (BRENNAN, J., concurring in part and concurring in judgment); *Renton*, *supra*, at 55 (BRENNAN, J., concurring in part and concurring in judgment), I fear that its broad application may encourage widespread official censorship.

context, supports the majority's position,² in practice, the Court has interpreted the narrow tailoring requirement to mandate an examination of alternative methods of serving the asserted governmental interest and a determination whether the greater efficacy of the challenged regulation outweighs the increased burden it places on protected speech. See, e. g., *Martin v. Struthers*, 319 U. S. 141, 147-148 (1943); *Schneider v. State*, 308 U. S. 147, 162 (1939). In *Schneider*, for example, the Court invalidated a ban on handbill distribution on public streets, notwithstanding that it was the most effective means of serving government's legitimate interest in minimizing litter, noise, and traffic congestion, and in preventing fraud. The Court concluded that punishing those who actually litter or perpetrate frauds was a much less intrusive, albeit not quite as effective, means to serve those significant interests. *Id.*, at 162, 164; see also *Martin*, *supra*, at 148 (invalidating ban on door-to-door distribution of handbills because directly punishing fraudulent solicitation was a less intrusive, yet still effective, means of serving government's interest in preventing fraud).³

² *United States v. Albertini*, 472 U. S. 675 (1985), for example, involved a person's right to enter a military base, which, unlike a public park, is not a place traditionally dedicated to free expression. *Id.*, at 687 (commanding officer's power to exclude civilians from a military base cannot "be analyzed in the same manner as government regulation of a traditional public forum"). Nor can isolated language from JUSTICE WHITE's opinion in *Regan v. Time, Inc.*, 468 U. S. 641, 657 (1984), which commanded the votes of only three other Justices, be construed as this Court's definitive explication of the narrow tailoring requirement.

³ The majority relies heavily on *Clark v. Community for Creative Non-Violence*, 468 U. S. 288 (1984), but in that case, the Court engaged in an inquiry similar to the one the majority now rejects; it considered whether the increased efficacy of the challenged regulation warranted the increased burden on speech. *Id.*, at 299 ("[P]reventing overnight sleeping will avoid a measure of actual or threatened damage"; however, "minimiz[ing] the possible injury by reducing the size, duration, or frequency of demonstrations would still curtail the total allowable expression in which demonstrators could engage").

The Court's past concern for the extent to which a regulation burdens speech more than would a satisfactory alternative is noticeably absent from today's decision. The majority requires only that government show that its interest cannot be served as effectively without the challenged restriction. *Ante*, at 799. It will be enough, therefore, that the challenged regulation advances the government's interest only in the slightest, for any differential burden on speech that results does not enter the calculus. Despite its protestations to the contrary, the majority thus has abandoned the requirement that restrictions on speech be narrowly tailored in any ordinary use of the phrase.⁴ Indeed, after today's decision, a city could claim that bans on handbill distribution or on door-to-door solicitation are the most effective means of avoiding littering and fraud, or that a ban on loudspeakers and radios in a public park is the most effective means of avoiding loud noise. Logically extended, the majority's analysis would permit such far-reaching restrictions on speech.

True, the majority states that "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ibid.* But this means that only those regulations that "engage in the gratuitous inhibition of expression" will be invalidated. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1485 (1975). Moreover, the majority has robbed courts of the necessary analytic tools to make even this limited inquiry. The Court of Appeals examined "how much control of volume is appropriate [and] how that level of control is to be achieved," *ante*, at 800, but the majority admonishes that court for doing so, stating that it should

⁴In marked contrast, Members of the majority recently adopted a far more stringent narrow tailoring requirement in the affirmative-action context. See *Richmond v. J. A. Croson Co.*, 488 U. S. 469, 507-508 (1989).

have “defer[red] to the city’s reasonable determination.” *Ibid.* The majority thus instructs courts to refrain from examining how much speech may be restricted to serve an asserted interest and how that level of restriction is to be achieved. If a court cannot engage in such inquiries, I am at a loss to understand how a court can ascertain whether the government has adopted a regulation that burdens substantially more speech than is necessary.

Had the majority not abandoned the narrow tailoring requirement, the Guidelines could not possibly survive constitutional scrutiny. Government’s interest in avoiding loud sounds cannot justify giving government total control over sound equipment, any more than its interest in avoiding litter could justify a ban on handbill distribution. In both cases, government’s legitimate goals can be effectively and less intrusively served by directly punishing the evil—the persons responsible for excessive sounds and the persons who litter. Indeed, the city concedes that it has an ordinance generally limiting noise but has chosen not to enforce it. See Tr. of Oral. Arg. 5–6.⁵

By holding that the Guidelines are valid time, place, and manner restrictions, notwithstanding the availability of less intrusive but effective means of controlling volume, the majority deprives the narrow tailoring requirement of all meaning.⁶ Today, the majority enshrines efficacy but sacrifices free speech.

⁵Significantly, the National Park Service relies on the very methods of volume control rejected by the city—monitoring sound levels on the perimeter of an event, communicating with event sponsors, and, if necessary, turning off the power. Brief for United States as *Amicus Curiae* 21. In light of the Park Service’s “experien[ce] with thousands of events over the years,” *ibid.*, the city’s claims that these methods of monitoring excessive sound are ineffective and impracticable are hard to accept.

⁶Because I conclude that the Guidelines are not narrowly tailored, there is no need to consider whether there are ample alternative channels for communication. I note only that the availability of alternative channels of communication outside a public park does not magically validate a

II

The majority's conclusion that the city's exclusive control of sound equipment is constitutional is deeply troubling for another reason. It places the Court's *imprimatur* on a quintessential prior restraint, incompatible with fundamental First Amendment values. See *Near v. Minnesota ex rel. Olson*, 283 U. S. 697 (1931). Indeed, just as "[m]usic is one of the oldest forms of human expression," *ante*, at 790, the city's regulation is one of the oldest forms of speech repression. In 16th- and 17th-century England, government controlled speech through its monopoly on printing presses. See L. Levy, *Emergence of a Free Press* 6 (1985). Here, the city controls the volume and mix of sound through its monopoly on sound equipment. In both situations, government's exclusive control of the means of communication enables public officials to censor speech in advance of its expression. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546, 553 (1975). Under more familiar prior restraints, government officials censor speech "by a simple stroke of the pen," Emerson, *The Doctrine of Prior Restraint*, 20 *Law & Contemp. Prob.* 648, 657 (1955). Here, it is done by a single turn of a knob.

The majority's implication that government control of sound equipment is not a prior restraint because city officials do not "enjoy unguided discretion to deny the right to speak altogether," *ante*, at 794, is startling. In the majority's view, this case involves a question of "different and lesser" magnitude—the discretion to provide inadequate sound for performers. But whether the city denies a performer a bandshell permit or grants the permit and then silences or

government restriction on protected speech within it. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546, 556 (1975) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place," quoting *Schneider v. State*, 308 U. S. 147, 163 (1939)).

distorts the performer's music, the result is the same—the city censors speech. In the words of CHIEF JUSTICE REHNQUIST, the First Amendment means little if it permits government to “allo[w] a speaker in a public hall to express his views while denying him the use of an amplifying system.” *FEC v. National Conservative Political Action Committee*, 470 U. S. 480, 493 (1985); see also *Southeastern Promotions, supra*, at 556, n. 8 (“A licensing system need not effect total suppression in order to create a prior restraint”).

As a system of prior restraint, the Guidelines are presumptively invalid. See *Southeastern Promotions, supra*, at 558; *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 70 (1963). They may be constitutional only if accompanied by the procedural safeguards necessary “to obviate the dangers of a censorship system.” *Freedman v. Maryland*, 380 U. S. 51, 58 (1965). The city must establish neutral criteria embodied in “narrowly drawn, reasonable and definite standards,” in order to ensure that discretion is not exercised based on the content of speech. *Niemotko v. Maryland*, 340 U. S. 268, 271 (1951); see also *Lakewood v. Plain Dealer Publishing Co.*, 486 U. S., 750, 758 (1988); *Shuttlesworth v. Birmingham*, 394 U. S. 147, 150–151 (1969). Moreover, there must be “an almost immediate judicial determination” that the restricted material was unprotected by the First Amendment. *Bantam Books, supra*, at 70; see also *Southeastern Promotions, supra*, at 560.

The Guidelines contain neither of these procedural safeguards. First, there are no “narrowly drawn, reasonable and definite standards” guiding the hands of the city’s sound technician as he mixes the sound. The Guidelines state that the goals are “to provide the best sound for all events” and to “insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone.” App. 375; see also *ante*, at 794. But the city never defines “best sound” or “appropriate sound quality.” The bandshell program director-manager testified that quality of

sound refers to tone and to sound mix. App. 229, 230. Yet questions of tone and mix cannot be separated from musical expression as a whole. See *The New Grove Dictionary of Music and Musicians* 51–55 (S. Sadie ed. 1980) (tonality involves relationship between pitches and harmony); F. Everest, *Successful Sound System Operation* 173 (1985) (“The mixing console . . . must be considered as a creative tool”). Because judgments that sounds are too loud, noiselike, or discordant can mask disapproval of the music itself,⁷ government control of the sound-mixing equipment necessitates detailed and neutral standards.

The majority concedes that the standards in the Guidelines are “undoubtedly flexible” and that “the officials implementing them will exercise considerable discretion.” *Ante*, at 794. Nevertheless, it concludes that “[b]y its own terms the city’s sound-amplification guideline must be interpreted to forbid city officials purposefully to select inadequate sound systems or to vary the sound quality or volume based on the message being delivered by performers.” *Ante*, at 794–795. Although the majority wishes it were so, the language of the Guidelines simply does not support such a limitation on the city’s discretion. Alternatively, the majority finds a limitation in the city’s practice of deferring to the sponsor with respect to sound mix, and of conferring “with the sponsor if any questions of excessive sound arise, before taking any corrective action.” 658 F. Supp. 1346, 1352 (SDNY 1987). A promise to consult, however, does not provide the detailed

⁷“New music always sounds loud to old ears. Beethoven seemed to make more noise than Mozart; Liszt was noisier than Beethoven; Schoenberg and Stravinsky, noisier than any of their predecessors.” N. Slonimsky, *Lexicon of Musical Invective: Critical Assaults on Composers Since Beethoven’s Time* 18 (1953). One music critic wrote of Prokofiev: “Those who do not believe that genius is evident in superabundance of noise, looked in vain for a new musical message in Mr. Prokofiev’s work. Nor in the *Classical Symphony*, which the composer conducted, was there any cessation from the orgy of discordant sounds.” *Id.*, at 5 (internal quotations omitted).

“neutral criteria” necessary to prevent future abuses of discretion any more than did the city’s promise in *Lakewood* to deny permit applications only for reasons related to the health, safety, or welfare of Lakewood citizens. Indeed, a presumption that city officials will act in good faith and adhere to standards absent from a regulation’s face is “the very presumption that the doctrine forbidding unbridled discretion disallows.” *Lakewood, supra*, at 770.⁸

Second, even if there were narrowly drawn guidelines limiting the city’s discretion, the Guidelines would be fundamentally flawed. For the requirement that there be detailed standards is of value only so far as there is a judicial mechanism to enforce them. Here, that necessary safeguard is absent. The city’s sound technician consults with the performers for several minutes before the performance and then decides how to present each song or piece of music. During the performance itself, the technician makes hundreds of decisions affecting the mix and volume of sound. Tr. of Oral Arg. 13. The music is played immediately after each decision. There is, of course, no time for appeal in the middle of a song. As a result, no court ever determines that a particular restraint on speech is necessary. The city’s admission that it does not impose sanctions on violations of its general sound ordinance because the necessary litigation is too costly and time consuming only underscores its contempt for the need for judicial review of restrictions on speech. *Id.*, at 5. With neither prompt judicial review nor detailed and neutral standards fettering the city’s discretion to restrict protected

⁸Of course, if the city always defers to a performer’s wishes in sound mixing, then it is difficult to understand the need for a city technician to operate the mixing console. See Tr. of Oral. Arg. 12 (city concedes that the possibilities for a confrontation over volume are the same whether the city technician directly controls the mixing console or sits next to a performer’s technician who operates the equipment). Conversely, if the city can control sound only by using its own equipment and technician, then it must not be heeding all the performer’s wishes on sound mixing.

speech, the Guidelines constitute a quintessential, and unconstitutional, prior restraint.

III

Today's decision has significance far beyond the world of rock music. Government no longer need balance the effectiveness of regulation with the burdens on free speech. After today, government need only assert that it is most effective to control speech in advance of its expression. Because such a result eviscerates the First Amendment, I dissent.

HEINONLINE

Citation: 538 U.S. 343 2002

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Mon Apr 18 12:57:20 2011

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.

Syllabus

VIRGINIA *v.* BLACK ET AL.

CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 01-1107. Argued December 11, 2002—Decided April 7, 2003

Respondents were convicted separately of violating a Virginia statute that makes it a felony “for any person . . . , with the intent of intimidating any person or group . . . , to burn . . . a cross on the property of another, a highway or other public place,” and specifies that “[a]ny such burning . . . shall be prima facie evidence of an intent to intimidate a person or group.” When respondent Black objected on First Amendment grounds to his trial court’s jury instruction that cross burning by itself is sufficient evidence from which the required “intent to intimidate” could be inferred, the prosecutor responded that the instruction was taken straight out of the Virginia Model Instructions. Respondent O’Mara pleaded guilty to charges of violating the statute, but reserved the right to challenge its constitutionality. At respondent Elliott’s trial, the judge instructed the jury as to what the Commonwealth had to prove, but did not give an instruction on the meaning of the word “intimidate,” nor on the statute’s prima facie evidence provision. Consolidating all three cases, the Virginia Supreme Court held that the cross-burning statute is unconstitutional on its face; that it is analytically indistinguishable from the ordinance found unconstitutional in *R. A. V. v. St. Paul*, 505 U.S. 377; that it discriminates on the basis of content and viewpoint since it selectively chooses only cross burning because of its distinctive message; and that the prima facie evidence provision renders the statute overbroad because the enhanced probability of prosecution under the statute chills the expression of protected speech.

Held: The judgment is affirmed in part, vacated in part, and remanded. 262 Va. 764, 553 S. E. 2d 738, affirmed in part, vacated in part, and remanded.

JUSTICE O’CONNOR delivered the opinion of the Court with respect to Parts I, II, and III, concluding that a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate. Pp. 352–363.

(a) Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan, which, following its formation in 1866, imposed a reign of terror throughout the South, whipping, threatening, and murdering blacks, southern whites who disagreed with the Klan, and “carpetbagger” northern whites. The Klan has often used cross burnings as a tool of intimidation and a threat of impending vio-

Syllabus

lence, although such burnings have also remained potent symbols of shared group identity and ideology, serving as a central feature of Klan gatherings. To this day, however, regardless of whether the message is a political one or is also meant to intimidate, the burning of a cross is a “symbol of hate.” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 771. While cross burning does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful. Pp. 352–357.

(b) The protections the First Amendment affords speech and expressive conduct are not absolute. This Court has long recognized that the government may regulate certain categories of expression consistent with the Constitution. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–572. For example, the First Amendment permits a State to ban “true threats,” e.g., *Watts v. United States*, 394 U.S. 705, 708 (*per curiam*), which encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals, see, e.g., *ibid.* The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur. *R. A. V.*, *supra*, at 388. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As the history of cross burning in this country shows, that act is often intimidating, intended to create a pervasive fear in victims that they are a target of violence. Pp. 358–360.

(c) The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning’s long and pernicious history as a signal of impending violence. A ban on cross burning carried out with the intent to intimidate is fully consistent with this Court’s holding in *R. A. V.* Contrary to the Virginia Supreme Court’s ruling, *R. A. V.* did not hold that the First Amendment prohibits *all* forms of content-based discrimination within a proscribable area of speech. Rather, the Court specifically stated that a particular type of content discrimination does not violate the First Amendment when the basis for it consists

Syllabus

entirely of the very reason its entire class of speech is proscribable. 505 U. S., at 388. For example, it is permissible to prohibit only that obscenity that is most patently offensive in its prurience—*i. e.*, that which involves the most lascivious displays of sexual activity. *Ibid.* Similarly, Virginia's statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R. A. V.*, the Virginia statute does not single out for opprobrium only that speech directed toward "one of the specified disfavored topics." *Id.*, at 391. It does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's "political affiliation, union membership, or homosexuality." *Ibid.* Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. Pp. 360–363.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE BREYER, concluded in Parts IV and V that the Virginia statute's *prima facie* evidence provision, as interpreted through the jury instruction given in respondent Black's case and as applied therein, is unconstitutional on its face. Because the instruction is the same as the Commonwealth's Model Jury Instruction, and because the Virginia Supreme Court had the opportunity to expressly disavow it, the instruction's construction of the *prima facie* provision is as binding on this Court as if its precise words had been written into the statute. *E. g.*, *Terminiello v. Chicago*, 337 U. S. 1, 4. As construed by the instruction, the *prima facie* provision strips away the very reason why a State may ban cross burning with the intent to intimidate. The provision permits a jury to convict in every cross burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. It permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself. As so interpreted, it would create an unacceptable risk of the suppression of ideas. *E. g.*, *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U. S. 947, 965, n. 13. The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation, or it may mean only that the person is engaged in core political speech. The *prima facie* evidence provision blurs the line between these meanings, ignoring all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut. Thus, Black's conviction cannot stand, and the judgment as

Syllabus

to him is affirmed. Conversely, Elliott's jury did not receive any instruction on the prima facie provision, and the provision was not an issue in O'Mara's case because he pleaded guilty. The possibility that the provision is severable, and if so, whether Elliott and O'Mara could be retried under the statute, is left open. Also left open is the theoretical possibility that, on remand, the Virginia Supreme Court could interpret the prima facie provision in a manner that would avoid the constitutional objections described above. Pp. 363–368.

JUSTICE SCALIA agreed that this Court should vacate and remand the judgment of the Virginia Supreme Court with respect to respondents Elliott and O'Mara so that that court can have an opportunity authoritatively to construe the cross-burning statute's prima-facie-evidence provision. Pp. 368, 379.

JUSTICE SOUTER, joined by JUSTICE KENNEDY and JUSTICE GINSBURG, concluded that the Virginia statute is unconstitutional and cannot be saved by any exception under *R. A. V. v. St. Paul*, 505 U.S. 377, and therefore concurred in the Court's judgment insofar as it affirms the invalidation of respondent Black's conviction. Pp. 380–381, 387.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, in which REHNQUIST, C. J., and STEVENS, SCALIA, and BREYER, JJ., joined, and an opinion with respect to Parts IV and V, in which REHNQUIST, C. J., and STEVENS and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 368. SCALIA, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which THOMAS, J., joined as to Parts I and II, *post*, p. 368. SOUTER, J., filed an opinion concurring in the judgment in part and dissenting in part, in which KENNEDY and GINSBURG, JJ., joined, *post*, p. 380. THOMAS, J., filed a dissenting opinion, *post*, p. 388.

William H. Hurd, State Solicitor of Virginia, argued the cause for petitioner. With him on the brief were *Jerry W. Kilgore*, Attorney General, *Maureen Riley Matsen* and *William E. Thro*, Deputy State Solicitors, and *Alison P. Landry*, Assistant Attorney General.

Deputy Solicitor General Dreeben argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General Boyd*, *Barbara McDowell*, *Jessica Dunsay Silver*, and *Linda F. Thome*.

Opinion of the Court

Rodney A. Smolla argued the cause for respondents. With him on the brief were *James O. Broccoletti*, *David P. Baugh*, and *Kevin E. Martingayle*.*

JUSTICE O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, and an opinion with respect to Parts IV and V, in which THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE BREYER join.

In this case we consider whether the Commonwealth of Virginia's statute banning cross burning with "an intent to intimidate a person or group of persons" violates the First Amendment. Va. Code Ann. § 18.2-423 (1996). We conclude that while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating any

*Briefs of *amici curiae* urging reversal were filed for the State of California by *Bill Lockyer*, Attorney General, *Manuel M. Medeiros*, State Solicitor General, *Richard M. Frank*, Chief Assistant Attorney General, and *Angela Sierra*, Deputy Attorney General; for the State of New Jersey et al. by *David Samson*, Attorney General of New Jersey, and *Carol Johnston*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Janet Napolitano* of Arizona, *Richard Blumenthal* of Connecticut, *Thomas J. Miller* of Iowa, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Jennifer M. Granholm* of Michigan, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Roy Cooper* of North Carolina, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Mark L. Shurtleff* of Utah, and *William H. Sorrell* of Vermont; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

Briefs of *amici curiae* urging affirmance were filed for the Council of Conservative Citizens by *Edgar J. Steele*; for the Rutherford Institute by *John W. Whitehead* and *Steven H. Aden*; and for the Thomas Jefferson Center for the Protection of Free Expression by *Robert M. O'Neil* and *J. Joshua Wheeler*.

Martin E. Karlinsky, *Howard W. Goldstein*, *Steven M. Freeman*, *Frederrick M. Lawrence*, and *Elliot M. Minberg* filed a brief for the Anti-Defamation League et al. as *amici curiae*.

Opinion of the Court

cross burning as *prima facie* evidence of intent to intimidate renders the statute unconstitutional in its current form.

I

Respondents Barry Black, Richard Elliott, and Jonathan O'Mara were convicted separately of violating Virginia's cross-burning statute, § 18.2-423. That statute provides:

"It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.

"Any such burning of a cross shall be *prima facie* evidence of an intent to intimidate a person or group of persons."

On August 22, 1998, Barry Black led a Ku Klux Klan rally in Carroll County, Virginia. Twenty-five to thirty people attended this gathering, which occurred on private property with the permission of the owner, who was in attendance. The property was located on an open field just off Brushy Fork Road (State Highway 690) in Cana, Virginia.

When the sheriff of Carroll County learned that a Klan rally was occurring in his county, he went to observe it from the side of the road. During the approximately one hour that the sheriff was present, about 40 to 50 cars passed the site, a "few" of which stopped to ask the sheriff what was happening on the property. App. 71. Eight to ten houses were located in the vicinity of the rally. Rebecca Sechrist, who was related to the owner of the property where the rally took place, "sat and watched to see wha[t] [was] going on" from the lawn of her in-laws' house. She looked on as the Klan prepared for the gathering and subsequently conducted the rally itself. *Id.*, at 103.

During the rally, Sechrist heard Klan members speak about "what they were" and "what they believed in." *Id.*,

Opinion of the Court

at 106. The speakers “talked real bad about the blacks and the Mexicans.” *Id.*, at 109. One speaker told the assembled gathering that “he would love to take a .30/.30 and just random[ly] shoot the blacks.” *Ibid.* The speakers also talked about “President Clinton and Hillary Clinton,” and about how their tax money “goes to . . . the black people.” *Ibid.* Sechrist testified that this language made her “very . . . scared.” *Id.*, at 110.

At the conclusion of the rally, the crowd circled around a 25- to 30-foot cross. The cross was between 300 and 350 yards away from the road. According to the sheriff, the cross “then all of a sudden . . . went up in a flame.” *Id.*, at 71. As the cross burned, the Klan played Amazing Grace over the loudspeakers. Sechrist stated that the cross burning made her feel “awful” and “terrible.” *Id.*, at 110.

When the sheriff observed the cross burning, he informed his deputy that they needed to “find out who’s responsible and explain to them that they cannot do this in the State of Virginia.” *Id.*, at 72. The sheriff then went down the driveway, entered the rally, and asked “who was responsible for burning the cross.” *Id.*, at 74. Black responded, “I guess I am because I’m the head of the rally.” *Ibid.* The sheriff then told Black, “[T]here’s a law in the State of Virginia that you cannot burn a cross and I’ll have to place you under arrest for this.” *Ibid.*

Black was charged with burning a cross with the intent of intimidating a person or group of persons, in violation of § 18.2-423. At his trial, the jury was instructed that “intent to intimidate means the motivation to intentionally put a person or a group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused rather than from some mere temperamental timidity of the victim.” *Id.*, at 146. The trial court also instructed the jury that “the burning of a cross by itself is sufficient evidence from which you may infer the required intent.” *Ibid.* When Black objected to this last instruction on First Amendment grounds,

Opinion of the Court

the prosecutor responded that the instruction was “taken straight out of the [Virginia] Model Instructions.” *Id.*, at 134. The jury found Black guilty, and fined him \$2,500. The Court of Appeals of Virginia affirmed Black’s conviction. Rec. No. 1581–99–3 (Va. App., Dec. 19, 2000), App. 201.

On May 2, 1998, respondents Richard Elliott and Jonathan O’Mara, as well as a third individual, attempted to burn a cross on the yard of James Jubilee. Jubilee, an African-American, was Elliott’s next-door neighbor in Virginia Beach, Virginia. Four months prior to the incident, Jubilee and his family had moved from California to Virginia Beach. Before the cross burning, Jubilee spoke to Elliott’s mother to inquire about shots being fired from behind the Elliott home. Elliott’s mother explained to Jubilee that her son shot firearms as a hobby, and that he used the backyard as a firing range.

On the night of May 2, respondents drove a truck onto Jubilee’s property, planted a cross, and set it on fire. Their apparent motive was to “get back” at Jubilee for complaining about the shooting in the backyard. *Id.*, at 241. Respondents were not affiliated with the Klan. The next morning, as Jubilee was pulling his car out of the driveway, he noticed the partially burned cross approximately 20 feet from his house. After seeing the cross, Jubilee was “very nervous” because he “didn’t know what would be the next phase,” and because “a cross burned in your yard . . . tells you that it’s just the first round.” *Id.*, at 231.

Elliott and O’Mara were charged with attempted cross burning and conspiracy to commit cross burning. O’Mara pleaded guilty to both counts, reserving the right to challenge the constitutionality of the cross-burning statute. The judge sentenced O’Mara to 90 days in jail and fined him \$2,500. The judge also suspended 45 days of the sentence and \$1,000 of the fine.

At Elliott’s trial, the judge originally ruled that the jury would be instructed “that the burning of a cross by itself is

Opinion of the Court

sufficient evidence from which you may infer the required intent.” *Id.*, at 221–222. At trial, however, the court instructed the jury that the Commonwealth must prove that “the defendant intended to commit cross burning,” that “the defendant did a direct act toward the commission of the cross burning,” and that “the defendant had the intent of intimidating any person or group of persons.” *Id.*, at 250. The court did not instruct the jury on the meaning of the word “intimidate,” nor on the prima facie evidence provision of § 18.2–423. The jury found Elliott guilty of attempted cross burning and acquitted him of conspiracy to commit cross burning. It sentenced Elliott to 90 days in jail and a \$2,500 fine. The Court of Appeals of Virginia affirmed the convictions of both Elliott and O’Mara. *O’Mara v. Commonwealth*, 33 Va. App. 525, 535 S. E. 2d 175 (2000).

Each respondent appealed to the Supreme Court of Virginia, arguing that § 18.2–423 is facially unconstitutional. The Supreme Court of Virginia consolidated all three cases, and held that the statute is unconstitutional on its face. 262 Va. 764, 553 S. E. 2d 738 (2001). It held that the Virginia cross-burning statute “is analytically indistinguishable from the ordinance found unconstitutional in *R. A. V. [v. St. Paul]*, 505 U. S. 377 (1992).” *Id.*, at 772, 553 S. E. 2d, at 742. The Virginia statute, the court held, discriminates on the basis of content since it “selectively chooses only cross burning because of its distinctive message.” *Id.*, at 774, 553 S. E. 2d, at 744. The court also held that the prima facie evidence provision renders the statute overbroad because “[t]he enhanced probability of prosecution under the statute chills the expression of protected speech.” *Id.*, at 777, 553 S. E. 2d, at 746.

Three justices dissented, concluding that the Virginia cross-burning statute passes constitutional muster because it proscribes only conduct that constitutes a true threat. The justices noted that unlike the ordinance found unconstitutional in *R. A. V. v. St. Paul*, 505 U. S. 377 (1992), the Virginia

Opinion of the Court

statute does not just target cross burning “on the basis of race, color, creed, religion or gender.” 262 Va., at 791, 553 S. E. 2d, at 753. Rather, “the Virginia statute applies to any individual who burns a cross for any reason provided the cross is burned with the intent to intimidate.” *Ibid.* The dissenters also disagreed with the majority’s analysis of the *prima facie* provision because the inference alone “is clearly insufficient to establish beyond a reasonable doubt that a defendant burned a cross with the intent to intimidate.” *Id.*, at 795, 553 S. E. 2d, at 756. The dissent noted that the burden of proof still remains on the Commonwealth to prove intent to intimidate. We granted certiorari. 535 U. S. 1094 (2002).¹

II

Cross burning originated in the 14th century as a means for Scottish tribes to signal each other. See M. Newton & J. Newton, *The Ku Klux Klan: An Encyclopedia* 145 (1991). Sir Walter Scott used cross burnings for dramatic effect in *The Lady of the Lake*, where the burning cross signified both a summons and a call to arms. See W. Scott, *The Lady of The Lake*, canto third. Cross burning in this country, however, long ago became unmoored from its Scottish ancestry. Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan.

The first Ku Klux Klan began in Pulaski, Tennessee, in the spring of 1866. Although the Ku Klux Klan started as a social club, it soon changed into something far different. The Klan fought Reconstruction and the corresponding drive to allow freed blacks to participate in the political process.

¹ After we granted certiorari, the Commonwealth enacted another statute designed to remedy the constitutional problems identified by the state court. See Va. Code Ann. § 18.2-423.01 (2002). Section 18.2-423.01 bans the burning of “an object” when done “with the intent of intimidating any person or group of persons.” The statute does not contain any *prima facie* evidence provision. Section 18.2-423.01, however, did not repeal § 18.2-423, the cross-burning statute at issue in this case.

Opinion of the Court

Soon the Klan imposed “a veritable reign of terror” throughout the South. S. Kennedy, *Southern Exposure* 31 (1991) (hereinafter Kennedy). The Klan employed tactics such as whipping, threatening to burn people at the stake, and murder. W. Wade, *The Fiery Cross: The Ku Klux Klan in America* 48–49 (1987) (hereinafter Wade). The Klan’s victims included blacks, southern whites who disagreed with the Klan, and “carpetbagger” northern whites.

The activities of the Ku Klux Klan prompted legislative action at the national level. In 1871, “President Grant sent a message to Congress indicating that the Klan’s reign of terror in the Southern States had rendered life and property insecure.” *Jett v. Dallas Independent School Dist.*, 491 U. S. 701, 722 (1989) (internal quotation marks and alterations omitted). In response, Congress passed what is now known as the Ku Klux Klan Act. See “An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes,” 17 Stat. 13 (now codified at 42 U. S. C. §§ 1983, 1985, and 1986). President Grant used these new powers to suppress the Klan in South Carolina, the effect of which severely curtailed the Klan in other States as well. By the end of Reconstruction in 1877, the first Klan no longer existed.

The genesis of the second Klan began in 1905, with the publication of Thomas Dixon’s *The Clansmen: An Historical Romance of the Ku Klux Klan*. Dixon’s book was a sympathetic portrait of the first Klan, depicting the Klan as a group of heroes “saving” the South from blacks and the “horrors” of Reconstruction. Although the first Klan never actually practiced cross burning, Dixon’s book depicted the Klan burning crosses to celebrate the execution of former slaves. *Id.*, at 324–326; see also *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753, 770–771 (1995) (THOMAS, J., concurring). Cross burning thereby became associated with the first Ku Klux Klan. When D. W. Griffith turned Dixon’s book into the movie *The Birth of a Nation* in 1915,

Opinion of the Court

the association between cross burning and the Klan became indelible. In addition to the cross burnings in the movie, a poster advertising the film displayed a hooded Klansman riding a hooded horse, with his left hand holding the reins of the horse and his right hand holding a burning cross above his head. Wade 127. Soon thereafter, in November 1915, the second Klan began.

From the inception of the second Klan, cross burnings have been used to communicate both threats of violence and messages of shared ideology. The first initiation ceremony occurred on Stone Mountain near Atlanta, Georgia. While a 40-foot cross burned on the mountain, the Klan members took their oaths of loyalty. See Kennedy 163. This cross burning was the second recorded instance in the United States. The first known cross burning in the country had occurred a little over one month before the Klan initiation, when a Georgia mob celebrated the lynching of Leo Frank by burning a “gigantic cross” on Stone Mountain that was “visible throughout” Atlanta. Wade 144 (internal quotation marks omitted).

The new Klan’s ideology did not differ much from that of the first Klan. As one Klan publication emphasized, “We avow the distinction between [the] races, . . . and we shall ever be true to the faithful maintenance of White Supremacy and will strenuously oppose any compromise thereof in any and all things.” *Id.*, at 147–148 (internal quotation marks omitted). Violence was also an elemental part of this new Klan. By September 1921, the New York World newspaper documented 152 acts of Klan violence, including 4 murders, 41 floggings, and 27 tar-and-featherings. Wade 160.

Often, the Klan used cross burnings as a tool of intimidation and a threat of impending violence. For example, in 1939 and 1940, the Klan burned crosses in front of synagogues and churches. See Kennedy 175. After one cross burning at a synagogue, a Klan member noted that if the cross burning did not “shut the Jews up, we’ll cut a few

Opinion of the Court

throats and see what happens.” *Ibid.* (internal quotation marks omitted). In Miami in 1941, the Klan burned four crosses in front of a proposed housing project, declaring, “We are here to keep niggers out of your town When the law fails you, call on us.” *Id.*, at 176 (internal quotation marks omitted). And in Alabama in 1942, in “a whirlwind climax to weeks of flogging and terror,” the Klan burned crosses in front of a union hall and in front of a union leader’s home on the eve of a labor election. *Id.*, at 180. These cross burnings embodied threats to people whom the Klan deemed antithetical to its goals. And these threats had special force given the long history of Klan violence.

The Klan continued to use cross burnings to intimidate after World War II. In one incident, an African-American “school teacher who recently moved his family into a block formerly occupied only by whites asked the protection of city police . . . after the burning of a cross in his front yard.” *Richmond News Leader*, Jan. 21, 1949, p. 19, App. 312. And after a cross burning in Suffolk, Virginia, during the late 1940’s, the Virginia Governor stated that he would “not allow any of our people of any race to be subjected to terrorism or intimidation in any form by the Klan or any other organization.” D. Chalmers, *Hooded Americanism: The History of the Ku Klux Klan* 333 (1980) (hereinafter Chalmers). These incidents of cross burning, among others, helped prompt Virginia to enact its first version of the cross-burning statute in 1950.

The decision of this Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), along with the civil rights movement of the 1950’s and 1960’s, sparked another outbreak of Klan violence. These acts of violence included bombings, beatings, shootings, stabbings, and mutilations. See, e.g., Chalmers 349–350; Wade 302–303. Members of the Klan burned crosses on the lawns of those associated with the civil rights movement, assaulted the Freedom Riders, bombed churches, and murdered blacks as well as whites

Opinion of the Court

whom the Klan viewed as sympathetic toward the civil rights movement.

Throughout the history of the Klan, cross burnings have also remained potent symbols of shared group identity and ideology. The burning cross became a symbol of the Klan itself and a central feature of Klan gatherings. According to the Klan constitution (called the kloran), the “fiery cross” was the “emblem of that sincere, unselfish devotedness of all klansmen to the sacred purpose and principles we have espoused.” The Ku Klux Klan Hearings before the House Committee on Rules, 67th Cong., 1st Sess., 114, Exh. G (1921); see also Wade 419. And the Klan has often published its newsletters and magazines under the name The Fiery Cross. See *id.*, at 226, 489.

At Klan gatherings across the country, cross burning became the climax of the rally or the initiation. Posters advertising an upcoming Klan rally often featured a Klan member holding a cross. See N. MacLean, *Behind the Mask of Chivalry: The Making of the Second Ku Klux Klan* 142–143 (1994). Typically, a cross burning would start with a prayer by the “Klavern” minister, followed by the singing of Onward Christian Soldiers. The Klan would then light the cross on fire, as the members raised their left arm toward the burning cross and sang The Old Rugged Cross. Wade 185. Throughout the Klan’s history, the Klan continued to use the burning cross in their ritual ceremonies.

For its own members, the cross was a sign of celebration and ceremony. During a joint Nazi-Klan rally in 1940, the proceeding concluded with the wedding of two Klan members who “were married in full Klan regalia beneath a blazing cross.” *Id.*, at 271. In response to antimasking bills introduced in state legislatures after World War II, the Klan burned crosses in protest. See Chalmers 340. On March 26, 1960, the Klan engaged in rallies and cross burnings throughout the South in an attempt to recruit 10 million members. See Wade 305. Later in 1960, the Klan became

Opinion of the Court

an issue in the third debate between Richard Nixon and John Kennedy, with both candidates renouncing the Klan. After this debate, the Klan reiterated its support for Nixon by burning crosses. See *id.*, at 309. And cross burnings featured prominently in Klan rallies when the Klan attempted to move toward more nonviolent tactics to stop integration. See *id.*, at 323; cf. Chalmers 368–369, 371–372, 380, 384. In short, a burning cross has remained a symbol of Klan ideology and of Klan unity.

To this day, regardless of whether the message is a political one or whether the message is also meant to intimidate, the burning of a cross is a “symbol of hate.” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S., at 771 (THOMAS, J., concurring). And while cross burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message conveyed. For example, when a cross burning is directed at a particular person not affiliated with the Klan, the burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical. The person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan’s wishes unless the victim is willing to risk the wrath of the Klan. Indeed, as the cases of respondents Elliott and O’Mara indicate, individuals without Klan affiliation who wish to threaten or menace another person sometimes use cross burning because of this association between a burning cross and violence.

In sum, while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful.

Opinion of the Court

III

A

The First Amendment, applicable to the States through the Fourteenth Amendment, provides that “Congress shall make no law . . . abridging the freedom of speech.” The hallmark of the protection of free speech is to allow “free trade in ideas”—even ideas that the overwhelming majority of people might find distasteful or discomforting. *Abrams v. United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting); see also *Texas v. Johnson*, 491 U. S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”). Thus, the First Amendment “ordinarily” denies a State “the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.” *Whitney v. California*, 274 U. S. 357, 374 (1927) (Brandeis, J., concurring). The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech. See, e. g., *R. A. V. v. City of St. Paul*, 505 U. S., at 382; *Texas v. Johnson*, *supra*, at 405–406; *United States v. O’Brien*, 391 U. S. 367, 376–377 (1968); *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503, 505 (1969).

The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution. See, e. g., *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571–572 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem”). The First Amendment permits “restrictions upon the content of speech in a few limited areas, which are ‘of such slight social value

Opinion of the Court

as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’” *R. A. V. v. City of St. Paul*, *supra*, at 382–383 (quoting *Chaplinsky v. New Hampshire*, *supra*, at 572).

Thus, for example, a State may punish those words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” *Chaplinsky v. New Hampshire*, *supra*, at 572; see also *R. A. V. v. City of St. Paul*, *supra*, at 383 (listing limited areas where the First Amendment permits restrictions on the content of speech). We have consequently held that fighting words—“those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction”—are generally proscribable under the First Amendment. *Cohen v. California*, 403 U. S. 15, 20 (1971); see also *Chaplinsky v. New Hampshire*, *supra*, at 572. Furthermore, “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U. S. 444, 447 (1969) (*per curiam*). And the First Amendment also permits a State to ban a “true threat.” *Watts v. United States*, 394 U. S. 705, 708 (1969) (*per curiam*) (internal quotation marks omitted); accord, *R. A. V. v. City of St. Paul*, *supra*, at 388 (“[T]hreats of violence are outside the First Amendment”); *Madsen v. Women’s Health Center, Inc.*, 512 U. S. 753, 774 (1994); *Schenck v. Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 373 (1997).

“True threats” encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. See *Watts v. United States*, *supra*, at 708 (“political hyberbole” is not a true threat); *R. A. V. v. City of St. Paul*, 505 U. S., at 388. The

Opinion of the Court

speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats “protect[s] individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.” *Ibid.* Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. Respondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so. As noted in Part II, *supra*, the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.

B

The Supreme Court of Virginia ruled that in light of *R. A. V. v. City of St. Paul, supra*, even if it is constitutional to ban cross burning in a content-neutral manner, the Virginia cross-burning statute is unconstitutional because it discriminates on the basis of content and viewpoint. 262 Va., at 771–776, 553 S. E. 2d, at 742–745. It is true, as the Supreme Court of Virginia held, that the burning of a cross is symbolic expression. The reason why the Klan burns a cross at its rallies, or individuals place a burning cross on someone else’s lawn, is that the burning cross represents the message that the speaker wishes to communicate. Individuals burn crosses as opposed to other means of communication because cross burning carries a message in an effective and dramatic manner.²

² JUSTICE THOMAS argues in dissent that cross burning is “conduct, not expression.” *Post*, at 394. While it is of course true that burning a cross is conduct, it is equally true that the First Amendment protects symbolic conduct as well as pure speech. See *supra*, at 358. As JUSTICE THOMAS has previously recognized, a burning cross is a “symbol of hate,” and a

Opinion of the Court

The fact that cross burning is symbolic expression, however, does not resolve the constitutional question. The Supreme Court of Virginia relied upon *R. A. V. v. City of St. Paul, supra*, to conclude that once a statute discriminates on the basis of this type of content, the law is unconstitutional. We disagree.

In *R. A. V.*, we held that a local ordinance that banned certain symbolic conduct, including cross burning, when done with the knowledge that such conduct would “‘arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender’” was unconstitutional. *Id.*, at 380 (quoting the St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)). We held that the ordinance did not pass constitutional muster because it discriminated on the basis of content by targeting only those individuals who “provoke violence” on a basis specified in the law. 505 U. S., at 391. The ordinance did not cover “[t]hose who wish to use ‘fighting words’ in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality.” *Ibid.* This content-based discrimination was unconstitutional because it allowed the city “to impose special prohibitions on those speakers who express views on disfavored subjects.” *Ibid.*

We did not hold in *R. A. V.* that the First Amendment prohibits *all* forms of content-based discrimination within a proscribable area of speech. Rather, we specifically stated that some types of content discrimination did not violate the First Amendment:

“When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or

“a symbol of white supremacy.” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753, 770–771 (1995) (concurring opinion).

Opinion of the Court

viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.” *Id.*, at 388.

Indeed, we noted that it would be constitutional to ban only a particular type of threat: “[T]he Federal Government can criminalize only those threats of violence that are directed against the President . . . since the reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the President.” *Ibid.* And a State may “choose to prohibit only that obscenity which is the most patently offensive *in its prurience*—*i. e.*, that which involves the most lascivious displays of sexual activity.” *Ibid.* (emphasis in original). Consequently, while the holding of *R. A. V.* does not permit a State to ban only obscenity based on “offensive *political* messages,” *ibid.*, or “only those threats against the President that mention his policy on aid to inner cities,” *ibid.*, the First Amendment permits content discrimination “based on the very reasons why the particular class of speech at issue . . . is proscribable,” *id.*, at 393.

Similarly, Virginia’s statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R. A. V.*, the Virginia statute does not single out for opprobrium only that speech directed toward “one of the specified disfavored topics.” *Id.*, at 391. It does not matter whether an individual burns a cross with intent to intimidate because of the victim’s race, gender, or religion, or because of the victim’s “political affiliation, union membership, or homosexuality.” *Ibid.* Moreover, as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities. See, *e. g.*, *supra*, at 355 (noting the instances of cross burnings directed at union members); *State v. Miller*, 6 Kan. App. 2d 432, 629 P. 2d 748 (1981) (describing

Opinion of O'CONNOR, J.

the case of a defendant who burned a cross in the yard of the lawyer who had previously represented him and who was currently prosecuting him). Indeed, in the case of Elliott and O'Mara, it is at least unclear whether the respondents burned a cross due to racial animus. See 262 Va., at 791, 553 S. E. 2d, at 753 (Hassell, J., dissenting) (noting that "these defendants burned a cross because they were angry that their neighbor had complained about the presence of a fire-arm shooting range in the Elliott's yard, not because of any racial animus").

The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R. A. V.* and is proscribable under the First Amendment.

IV

The Supreme Court of Virginia ruled in the alternative that Virginia's cross-burning statute was unconstitutionally overbroad due to its provision stating that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." Va. Code Ann. § 18.2-423 (1996). The Commonwealth added the prima facie provision to the statute in 1968. The court below did not reach whether this provision is severable from the rest of the cross-burning statute under Virginia law. See § 1-17.1 ("The provisions of all statutes are severable unless . . . it is

Opinion of O'CONNOR, J.

apparent that two or more statutes or provisions must operate in accord with one another"). In this Court, as in the Supreme Court of Virginia, respondents do not argue that the prima facie evidence provision is unconstitutional as applied to any one of them. Rather, they contend that the provision is unconstitutional on its face.

The Supreme Court of Virginia has not ruled on the meaning of the prima facie evidence provision. It has, however, stated that "the act of burning a cross alone, with no evidence of intent to intimidate, will nonetheless suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief." 262 Va., at 778, 553 S. E. 2d, at 746. The jury in the case of Richard Elliott did not receive any instruction on the prima facie evidence provision, and the provision was not an issue in the case of Jonathan O'Mara because he pleaded guilty. The court in Barry Black's case, however, instructed the jury that the provision means: "The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent." App. 196. This jury instruction is the same as the Model Jury Instruction in the Commonwealth of Virginia. See Virginia Model Jury Instructions, Criminal, Instruction No. 10.250 (1998 and Supp. 2001).

The prima facie evidence provision, as interpreted by the jury instruction, renders the statute unconstitutional. Because this jury instruction is the Model Jury Instruction, and because the Supreme Court of Virginia had the opportunity to expressly disavow the jury instruction, the jury instruction's construction of the prima facie provision "is a ruling on a question of state law that is as binding on us as though the precise words had been written into" the statute. *E. g.*, *Terminiello v. Chicago*, 337 U. S. 1, 4 (1949) (striking down an ambiguous statute on facial grounds based upon the instruction given to the jury); see also *New York v. Ferber*, 458 U. S. 747, 768, n. 21 (1982) (noting that *Terminiello* involved a facial challenge to the statute); *Secretary of State*

Opinion of O'CONNOR, J.

of *Md. v. Joseph H. Munson Co.*, 467 U. S. 947, 965, n. 13 (1984); Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 845–846, n. 8 (1970); Monaghan, *Overbreadth*, 1981 S. Ct. Rev. 1, 10–12; Blakey & Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 B. Y. U. L. Rev. 829, 883, n. 133. As construed by the jury instruction, the prima facie provision strips away the very reason why a State may ban cross burning with the intent to intimidate. The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense. And even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case. The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.

It is apparent that the provision as so interpreted “‘would create an unacceptable risk of the suppression of ideas.’” *Secretary of State of Md. v. Joseph H. Munson Co.*, *supra*, at 965, n. 13 (quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789, 797 (1984)). The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech. The prima facie evidence provision in this statute blurs the line between these two meanings of a burning cross. As interpreted by the jury instruction, the provision chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect.

As the history of cross burning indicates, a burning cross is not always intended to intimidate. Rather, sometimes the cross burning is a statement of ideology, a symbol of group

Opinion of O'CONNOR, J.

solidarity. It is a ritual used at Klan gatherings, and it is used to represent the Klan itself. Thus, "[b]urning a cross at a political rally would almost certainly be protected expression." *R. A. V. v. St. Paul*, 505 U. S., at 402, n. 4 (White, J., concurring in judgment) (citing *Brandenburg v. Ohio*, 395 U. S., at 445). Cf. *National Socialist Party of America v. Skokie*, 432 U. S. 43 (1977) (*per curiam*). Indeed, occasionally a person who burns a cross does not intend to express either a statement of ideology or intimidation. Cross burnings have appeared in movies such as *Mississippi Burning*, and in plays such as the stage adaptation of Sir Walter Scott's *The Lady of the Lake*.

The *prima facie* provision makes no effort to distinguish among these different types of cross burnings. It does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers. It allows a jury to treat a cross burning on the property of another with the owner's acquiescence in the same manner as a cross burning on the property of another without the owner's permission. To this extent I agree with JUSTICE SOUTER that the *prima facie* evidence provision can "skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning." *Post*, at 385 (opinion concurring in judgment in part and dissenting in part).

It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross. But this sense of anger or hatred is not sufficient to ban all cross burnings. As Gerald Gunther has stated, "The lesson I have drawn

Opinion of O'CONNOR, J.

from my childhood in Nazi Germany and my happier adult life in this country is the need to walk the sometimes difficult path of denouncing the bigot's hateful ideas with all my power, yet at the same time challenging any community's attempt to suppress hateful ideas by force of law." Casper, Gerry, 55 Stan. L. Rev. 647, 649 (2002) (internal quotation marks omitted). The prima facie evidence provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate. The First Amendment does not permit such a shortcut.

For these reasons, the prima facie evidence provision, as interpreted through the jury instruction and as applied in Barry Black's case, is unconstitutional on its face. We recognize that the Supreme Court of Virginia has not authoritatively interpreted the meaning of the prima facie evidence provision. Unlike JUSTICE SCALIA, we refuse to speculate on whether *any* interpretation of the prima facie evidence provision would satisfy the First Amendment. Rather, all we hold is that because of the interpretation of the prima facie evidence provision given by the jury instruction, the provision makes the statute facially invalid at this point. We also recognize the theoretical possibility that the court, on remand, could interpret the provision in a manner different from that so far set forth in order to avoid the constitutional objections we have described. We leave open that possibility. We also leave open the possibility that the provision is severable, and if so, whether Elliott and O'Mara could be retried under § 18.2-423.

V

With respect to Barry Black, we agree with the Supreme Court of Virginia that his conviction cannot stand, and we affirm the judgment of the Supreme Court of Virginia. With respect to Elliott and O'Mara, we vacate the judgment

Opinion of SCALIA, J.

of the Supreme Court of Virginia, and remand the case for further proceedings.

It is so ordered.

JUSTICE STEVENS, concurring.

Cross burning with “an intent to intimidate,” Va. Code Ann. § 18.2–423 (1996), unquestionably qualifies as the kind of threat that is unprotected by the First Amendment. For the reasons stated in the separate opinions that Justice White and I wrote in *R. A. V. v. St. Paul*, 505 U. S. 377 (1992), that simple proposition provides a sufficient basis for upholding the basic prohibition in the Virginia statute even though it does not cover other types of threatening expressive conduct. With this observation, I join JUSTICE O’CONNOR’s opinion.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins as to Parts I and II, concurring in part, concurring in the judgment in part, and dissenting in part.

I agree with the Court that, under our decision in *R. A. V. v. St. Paul*, 505 U. S. 377 (1992), a State may, without infringing the First Amendment, prohibit cross burning carried out with the intent to intimidate. Accordingly, I join Parts I–III of the Court’s opinion. I also agree that we should vacate and remand the judgment of the Virginia Supreme Court so that that court can have an opportunity authoritatively to construe the prima-facie-evidence provision of Va. Code Ann. § 18.2–423 (1996). I write separately, however, to describe what I believe to be the correct interpretation of § 18.2–423, and to explain why I believe there is no justification for the plurality’s apparent decision to invalidate that provision on its face.

I

Section 18.2–423 provides that the burning of a cross in public view “shall be prima facie evidence of an intent to intimidate.” In order to determine whether this component

Opinion of SCALIA, J.

of the statute violates the Constitution, it is necessary, first, to establish precisely what the presentation of *prima facie* evidence accomplishes.

Typically, “*prima facie* evidence” is defined as:

“Such evidence as, in the judgment of the law, is sufficient to establish a given fact . . . and which if not rebutted or contradicted, will remain sufficient. [Such evidence], if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but [it] may be contradicted by other evidence.” Black’s Law Dictionary 1190 (6th ed. 1990).

The Virginia Supreme Court has, in prior cases, embraced this canonical understanding of the pivotal statutory language. *E. g.*, *Babbitt v. Miller*, 192 Va. 372, 379–380, 64 S. E. 2d 718, 722 (1951) (“*Prima facie* evidence is evidence which on its first appearance is sufficient to raise a presumption of fact or establish the fact in question unless rebutted”). For example, in *Nance v. Commonwealth*, 203 Va. 428, 124 S. E. 2d 900 (1962), the Virginia Supreme Court interpreted a law of the Commonwealth that (1) prohibited the possession of certain “burglarious” tools “with intent to commit burglary, robbery, or larceny . . .,” and (2) provided that “[t]he possession of such burglarious tools . . . shall be *prima facie* evidence of an intent to commit burglary, robbery or larceny.” Va. Code Ann. § 18.1–87 (1960). The court explained that the *prima-facie*-evidence provision “cuts off no defense nor interposes any obstacle to a contest of the facts, and ‘relieves neither the court nor the jury of the duty to determine all of the questions of fact from the weight of the whole evidence.’” *Nance v. Commonwealth*, 203 Va., at 432, 124 S. E. 2d, at 903–904; see also *ibid.*, 124 S. E. 2d, at 904 (noting that the *prima-facie*-evidence provision “‘is merely a rule of evidence and not the determination of a fact . . .’”).

The established meaning in Virginia, then, of the term “*prima facie* evidence” appears to be perfectly orthodox: It

Opinion of SCALIA, J.

is evidence that suffices, on its own, to establish a particular fact. But it is hornbook law that this is true only to the extent that the evidence goes un rebutted. “Prima facie evidence of a fact is such evidence as, in judgment of law, is sufficient to establish the fact; and, *if not rebutted*, remains sufficient for the purpose.” 7B Michie’s Jurisprudence of Virginia and West Virginia §32 (1998) (emphasis added).

To be sure, Virginia is entirely free, if it wishes, to discard the canonical understanding of the term “prima facie evidence.” Its courts are also permitted to interpret the phrase in different ways for purposes of different statutes. In this case, however, the Virginia Supreme Court has done nothing of the sort. To the extent that tribunal has spoken to the question of what “prima facie evidence” means for purposes of §18.2–423, it has not deviated a whit from its prior practice and from the ordinary legal meaning of these words. Rather, its opinion explained that under §18.2–423, “the act of burning a cross alone, with no evidence of intent to intimidate, will . . . suffice for arrest and prosecution and will insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief.” 262 Va. 764, 778, 553 S. E. 2d 738, 746 (2001). Put otherwise, where the Commonwealth has demonstrated through its case in chief that the defendant burned a cross in public view, this is sufficient, at least until the defendant has come forward with rebuttal evidence, to create a jury issue with respect to the intent element of the offense.

It is important to note that the Virginia Supreme Court did not suggest (as did the trial court’s jury instructions in respondent Black’s case, see *infra*, at 377) that a jury may, in light of the prima-facie-evidence provision, ignore any rebuttal evidence that has been presented and, solely on the basis of a showing that the defendant burned a cross, find that he intended to intimidate. Nor, crucially, did that court say that the presentation of prima facie evidence is always sufficient to get a case to a jury, *i. e.*, that a court may never

Opinion of SCALIA, J.

direct a verdict for a defendant who has been shown to have burned a cross in public view, even if, by the end of trial, the defendant has presented rebuttal evidence. Instead, according to the Virginia Supreme Court, the effect of the prima-facie-evidence provision is far more limited. It suffices to “insulate the Commonwealth from a motion to strike the evidence *at the end of its case-in-chief*,” but it does nothing more. 262 Va., at 778, 553 S. E. 2d, at 746 (emphasis added). That is, presentation of evidence that a defendant burned a cross in public view is automatically sufficient, on its own, to support an inference that the defendant intended to intimidate *only until* the defendant comes forward with some evidence in rebuttal.

II

The question presented, then, is whether, given this understanding of the term “prima facie evidence,” the cross-burning statute is constitutional. The Virginia Supreme Court answered that question in the negative. It stated that “§ 18.2-423 sweeps within its ambit for arrest and prosecution, both protected and unprotected speech.” *Ibid*. “The enhanced probability of prosecution under the statute chills the expression of protected speech sufficiently to render the statute overbroad.” *Id.*, at 777, 553 S. E. 2d, at 746.

This approach toward overbreadth analysis is unprecedented. We have never held that the mere threat that individuals who engage in protected conduct will be subject to arrest and prosecution suffices to render a statute overbroad. Rather, our overbreadth jurisprudence has consistently focused on whether *the prohibitory terms* of a particular statute extend to protected conduct; that is, we have inquired whether individuals who engage in protected conduct can be *convicted* under a statute, not whether they might be subject to arrest and prosecution. *E. g.*, *Houston v. Hill*, 482 U. S. 451, 459 (1987) (a statute “that *make[s] unlawful* a substantial amount of constitutionally protected conduct may be held facially invalid” (emphasis added)); *Grayned v. City of Rock-*

Opinion of SCALIA, J.

ford, 408 U. S. 104, 114 (1972) (a statute may be overbroad “if in its reach it *prohibits* constitutionally protected conduct” (emphasis added)); *R. A. V. v. St. Paul*, 505 U. S., at 397 (White, J., concurring in judgment) (deeming the ordinance at issue “fatally overbroad because it *criminalizes* . . . expression protected by the First Amendment” (emphasis added)).

Unwilling to embrace the Virginia Supreme Court’s novel mode of overbreadth analysis, today’s opinion properly focuses on the question of who may be convicted, rather than who may be arrested and prosecuted, under § 18.2–423. Thus, it notes that “[t]he prima facie evidence provision permits a jury to *convict* in every cross-burning case in which defendants exercise their constitutional right not to put on a defense.”¹ *Ante*, at 365 (emphasis added). In such cases, the plurality explains, “[t]he provision permits the Commonwealth to arrest, prosecute, *and convict* a person based solely on the fact of cross burning itself.” *Ibid.* (emphasis added). And this, according to the plurality, is constitutionally problematic because “a burning cross is not always intended to intimidate,” and nonintimidating cross burning cannot be prohibited. *Ibid.* In particular, the opinion notes that cross burning may serve as “a statement of ideology” or “a symbol of group solidarity” at Ku Klux Klan rituals, and may even serve artistic purposes as in the case of the film *Mississippi Burning*. *Ante*, at 365–366.

The plurality is correct in all of this—and it means that some individuals who engage in protected speech may, be-

¹ The plurality also asserts that “even where a defendant like Black presents a defense, the prima facie evidence provision makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case.” *Ante*, at 365. There is no basis for this assertion. The Virginia Supreme Court’s opinion in *Nance v. Commonwealth*, 203 Va. 428, 432, 124 S. E. 2d 900, 903–904 (1962), states, in no uncertain terms, that the presentation of a prima facie case “relieves neither the court nor the jury of the duty to determine all of the questions of fact from the weight of *the whole evidence*.” (Emphasis added.)

Opinion of SCALIA, J.

cause of the prima-facie-evidence provision, be subject to conviction. Such convictions, assuming they are unconstitutional, could be challenged on a case-by-case basis. The plurality, however, with little in the way of explanation, leaps to the conclusion that the *possibility* of such convictions justifies facial invalidation of the statute.

In deeming § 18.2–423 facially invalid, the plurality presumably means to rely on some species of overbreadth doctrine.² But it must be a rare species indeed. We have noted that “[i]n a facial challenge to the overbreadth and vagueness of a law, a court’s first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.” *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 494 (1982). If one looks only to the core provision of § 18.2–423—“[i]t shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross . . .”—it appears *not* to capture any protected conduct; that language is limited in its reach to con-

² Overbreadth was, of course, the framework of analysis employed by the Virginia Supreme Court. See 262 Va. 764, 777–778, 553 S. E. 2d 738, 745–746 (2001) (examining the prima-facie-evidence provision in a section labeled “OVERBREADTH ANALYSIS” and holding that the provision “is overbroad”). Likewise, in their submissions to this Court, the parties’ analyses of the prima-facie-evidence provision focus on the question of overbreadth. Brief for Petitioner 41–50 (confining its discussion of the prima-facie-evidence provision to a section titled “THE VIRGINIA STATUTE IS NOT OVERBROAD”); Brief for Respondents 39–41 (arguing that “[t]he prima facie evidence provision . . . render[s] [the statute] overbroad”); Reply Brief for Petitioner 13–20 (dividing its discussion of the prima-facie-evidence provision into sections titled “There Is No Real Overbreadth” and “There Is No Substantial Overbreadth”). This reliance on overbreadth doctrine is understandable. This Court has made clear that to succeed in a facial challenge *without* relying on overbreadth doctrine, “the challenger must establish that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U. S. 739, 745 (1987). As the Court’s opinion concedes, some of the speech covered by § 18.2–423 can constitutionally be proscribed, *ante*, at 363.

Opinion of SCALIA, J.

duct which a State is, under the Court's holding, *ante*, at 363, allowed to prohibit. In order to identify *any* protected conduct that is affected by Virginia's cross-burning law, the plurality is compelled to focus not on the statute's core prohibition, but on the prima-facie-evidence provision, and hence on *the process* through which the prohibited conduct may be found by a jury.³ And even in that context, the plurality cannot claim that improper convictions will result from the operation of the prima-facie-evidence provision *alone*. As the plurality concedes, the only persons who might impermissibly be convicted by reason of that provision are those who adopt a particular trial strategy, to wit, abstaining from the presentation of a defense.

The plurality is thus left with a strikingly attenuated argument to support the claim that Virginia's cross-burning statute is facially invalid. The class of persons that the plurality contemplates could impermissibly be convicted under § 18.2-423 includes only those individuals who (1) burn a cross in public view, (2) do not intend to intimidate, (3) are nonetheless charged and prosecuted, and (4) refuse to present a defense. *Ante*, at 365 ("The prima facie evidence provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense").

Conceding (quite generously, in my view) that this class of persons exists, it cannot possibly give rise to a viable facial challenge, not even with the aid of our First Amendment

³ Unquestionably, the process through which elements of a criminal offense are established in a jury trial may raise serious constitutional concerns. Typically, however, such concerns sound in due process, not First Amendment overbreadth. *E. g.*, *County Court of Ulster Cty. v. Allen*, 442 U. S. 140, 156-157 (1979); *Barnes v. United States*, 412 U. S. 837, 838 (1973); *In re Winship*, 397 U. S. 358, 359 (1970). Respondents in this case have not challenged § 18.2-423 under the Due Process Clause, and neither the plurality nor the Virginia Supreme Court relies on due process in declaring the statute invalid.

Opinion of SCALIA, J.

overbreadth doctrine. For this Court has emphasized repeatedly that “where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but *substantial* as well, judged in relation to the statute’s plainly legitimate sweep.” *Osborne v. Ohio*, 495 U. S. 103, 112 (1990) (internal quotation marks omitted; emphasis added). See also *Houston v. Hill*, 482 U. S., at 458 (“Only a statute that is substantially overbroad may be invalidated on its face”); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U. S. 789, 800 (1984) (“[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge”); *New York v. Ferber*, 458 U. S. 747, 771 (1982) (“[A] law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications . . .”). The notion that the set of cases identified by the plurality in which convictions might improperly be obtained is sufficiently large to render the statute *substantially* overbroad is fanciful. The potential improper convictions of which the plurality complains are more appropriately classified as the sort of “marginal applications” of a statute in light of which “facial invalidation is inappropriate.” *Parker v. Levy*, 417 U. S. 733, 760 (1974).⁴

⁴ Confronted with the incontrovertible fact that this statute easily passes overbreadth analysis, the plurality is driven to the truly startling assertion that a statute which is not invalid in all of its applications may nevertheless be facially invalidated *even if it is not overbroad*. The only expression of that proposition that the plurality can find in our jurisprudence appears in footnote dictum in the 5-to-4 opinion in *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U. S. 947, 965–966, n. 13 (1984). See *id.*, at 975 (REHNQUIST, J., joined by Burger, C. J., and Powell and O’CONNOR, JJ., dissenting). *Stare decisis* cannot explain the newfound affection for this errant doctrine (even if *stare decisis* applied to dictum), because the holding of a *later* opinion (joined by six Justices) flatly repudiated it. See *United States v. Salerno*, *supra*, at 745 (REHNQUIST, C. J., joined by

Opinion of SCALIA, J.

Perhaps more alarming, the plurality concedes, *ante*, at 364, 365, that its understanding of the prima-facie-evidence provision is premised on the jury instructions given in respondent Black's case. This would all be well and good were it not for the fact that the plurality *facially invalidates* § 18.2-423. *Ante*, at 367 ("[T]he prima facie evidence provision, as interpreted through the jury instruction and as applied in Barry Black's case, is unconstitutional on its face"). I am aware of no case—and the plurality cites none—in which we have facially invalidated an *ambiguous* statute on the basis of a constitutionally troubling jury instruction.⁵ And it is alto-

White, Blackmun, Powell, O'CONNOR, and SCALIA, JJ.) (to succeed in a facial challenge without relying on overbreadth doctrine, "the challenger must establish that no set of circumstances exists under which the Act would be valid").

Even if I were willing, as the plurality apparently is, to ignore our repudiation of the *Munson* dictum, that case provides no foundation whatever for facially invalidating a statute under the conditions presented here. Our willingness facially to invalidate the statute in *Munson* without reliance on First Amendment overbreadth was premised on our conclusion that the challenged provision was invalid *in all of its applications*. We explained that "there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits." *Munson*, 467 U.S., at 965-966. And we stated that "[t]he flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." *Id.*, at 966. Unless the Court is prepared to abandon a contention that it takes great pains to establish—that "the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence," *ante*, at 360—it is difficult to see how *Munson* has any bearing on the constitutionality of the prima-facie-evidence provision.

⁵The plurality's reliance on *Terminiello v. Chicago*, 337 U.S. 1 (1949), is mistaken. In that case the Court deemed only the jury instruction, rather than the ordinance under review, to be constitutionally infirm. To be sure, it held that such a jury instruction could *never* support a constitutionally valid conviction, but that is quite different from holding the *ordinance* to be facially invalid. Insofar as the ordinance was concerned, *Terminiello* made repeated references to the as-applied nature of the

Opinion of SCALIA, J.

gether unsurprising that there is no precedent for such a holding. For where state law is ambiguous, treating jury instructions as binding interpretations would cede an enormous measure of power over state law to trial judges. A single judge's idiosyncratic reading of a state statute could trigger its invalidation. In this case, the troubling instruction—"The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent," App. 196—was taken verbatim from Virginia's Model Jury Instructions. But these Model Instructions have been neither promulgated by the legislature nor formally adopted by the Virginia Supreme Court. And it is hornbook law, in Virginia as elsewhere, that "[p]roffered instructions which do not correctly state the law . . . are erroneous and should be refused." 10A Michie's Jurisprudence of Virginia and West Virginia, Instructions § 15, p. 35 (Supp. 2000).

The plurality's willingness to treat this jury instruction as binding (and to strike down § 18.2-423 on that basis) would be shocking enough had the Virginia Supreme Court offered no guidance as to the proper construction of the prima-facie-evidence provision. For ordinarily we would decline to pass upon the constitutionality of an ambiguous state statute until that State's highest court had provided a binding construc-

challenge. *Id.*, at 3 (noting that the defendant "maintained at all times that the ordinance *as applied to his conduct* violated his right of free speech . . ." (emphasis added)); *id.*, at 5 (noting that "[a]s construed and applied [the provision] at least contains parts that are unconstitutional" (emphasis added)); *id.*, at 6 ("The pinch of the statute is in *its application*" (emphasis added)); *ibid.* ("The record makes clear that petitioner at all times challenged the constitutionality of the ordinance *as construed and applied to him*" (emphasis added)). See also Isserles, Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement, 48 Am. U. L. Rev. 359, 433, n. 333 (1998) (characterizing *Terminiello* as "adopting a court's jury instruction as an authoritative narrowing construction of a breach of the peace ordinance but ultimately confining its decision to overturning the defendant's conviction rather than invalidating the statute on its face").

Opinion of SCALIA, J.

tion. *E. g.*, *Arizonans for Official English v. Arizona*, 520 U. S. 43, 78 (1997). If there is any exception to that rule, it is the case where one of two possible interpretations of the state statute would clearly render it unconstitutional, and the other would not. In that situation, applying the maxim “*ut res magis valeat quam pereat*” we would do *precisely the opposite* of what the plurality does here—that is, we would adopt the alternative reading that renders the statute constitutional rather than unconstitutional. The plurality’s analysis is all the more remarkable given the dissonance between the interpretation of § 18.2–423 implicit in the jury instruction and the one suggested by the Virginia Supreme Court. That court’s opinion did not state that, once proof of public cross burning is presented, a jury is permitted to infer an intent to intimidate *solely* on this basis and regardless of whether a defendant has offered evidence to rebut any such inference. To the contrary, in keeping with the black-letter understanding of “prima facie evidence,” the Virginia Supreme Court explained that such evidence suffices only to “insulate the Commonwealth from a motion to strike the evidence at the end of its case-in-chief.” 262 Va., at 778, 553 S. E. 2d, at 746. The court did not so much as hint that a jury is permitted, under § 18.2–423, to ignore rebuttal evidence and infer an intent to intimidate strictly on the basis of the prosecution’s prima facie case. And unless and until the Supreme Court of Virginia tells us that the prima-facie-evidence provision permits a jury to infer intent under such conditions, this Court is entirely unjustified in facially invalidating § 18.2–423 on this basis.

As its concluding performance, in an apparent effort to paper over its unprecedented decision facially to invalidate a statute in light of an errant jury instruction, the plurality states:

“We recognize that the Supreme Court of Virginia has not authoritatively interpreted the meaning of the prima facie evidence provision. . . . We also recognize the

Opinion of SCALIA, J.

theoretical possibility that the court, on remand, could interpret the provision in a manner different from that so far set forth in order to avoid the constitutional objections we have described. We leave open that possibility.” *Ante*, at 367.

Now this is truly baffling. Having declared, in the immediately preceding sentence, that § 18.2-423 is “unconstitutional *on its face*,” *ibid.* (emphasis added), the plurality holds out the possibility that the Virginia Supreme Court will offer some saving construction of the statute. It should go without saying that if a saving construction of § 18.2-423 is possible, then facial invalidation is inappropriate. *E. g.*, *Harrison v. NAACP*, 360 U. S. 167, 176 (1959) (“[N]o principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them”). So, what appears to have happened is that the plurality has facially invalidated not § 18.2-423, but its own hypothetical interpretation of § 18.2-423, and has then remanded to the Virginia Supreme Court to learn the *actual* interpretation of § 18.2-423. Words cannot express my wonderment at this virtuoso performance.

III

As the analysis in Part I, *supra*, demonstrates, I believe the prima-facie-evidence provision in Virginia’s cross-burning statute is constitutionally unproblematic. Nevertheless, because the Virginia Supreme Court has not yet offered an authoritative construction of § 18.2-423, I concur in the Court’s decision to vacate and remand the judgment with respect to respondents Elliott and O’Mara. I also agree that respondent Black’s conviction cannot stand. As noted above, the jury in Black’s case was instructed that “[t]he burning of a cross, *by itself*, is sufficient evidence from which you may infer the required intent.” App. 196 (emphasis

Opinion of SOUTER, J.

added). Where this instruction has been given, it is impossible to determine whether the jury has rendered its verdict (as it must) in light of the entire body of facts before it—including evidence that might rebut the presumption that the cross burning was done with an intent to intimidate—or, instead, has chosen to ignore such rebuttal evidence and focused exclusively on the fact that the defendant burned a cross.⁶ Still, I cannot go along with the Court's decision to affirm the judgment with respect to Black. In that judgment, the Virginia Supreme Court, having erroneously concluded that § 18.2-423 is overbroad, not only vacated Black's conviction, but dismissed the indictment against him as well. 262 Va., at 779, 553 S. E. 2d, at 746. Because I believe the constitutional defect in Black's conviction is rooted in a jury instruction and not in the statute itself, I would not dismiss the indictment and would permit the Commonwealth to retry Black if it wishes to do so. It is an interesting question whether the plurality's willingness to let the Virginia Supreme Court resolve the plurality's make-believe facial invalidation of the statute extends as well to the facial invalidation insofar as it supports dismissal of the indictment against Black. Logically, there is no reason why it would not.

JUSTICE SOUTER, with whom JUSTICE KENNEDY and JUSTICE GINSBURG join, concurring in the judgment in part and dissenting in part.

I agree with the majority that the Virginia statute makes a content-based distinction within the category of punishable intimidating or threatening expression, the very type of dis-

⁶Though the jury may well have embraced the former (constitutionally permissible) understanding of its duties, that possibility is not enough to dissipate the cloud of constitutional doubt. See *Sandstrom v. Montana*, 442 U. S. 510, 517 (1979) (refusing to assume that the jury embraced a constitutionally sound understanding of an ambiguous instruction: "[W]e cannot discount the possibility that the jury may have interpreted the instruction [improperly]").

Opinion of SOUTER, J.

inction we considered in *R. A. V. v. St. Paul*, 505 U.S. 377 (1992). I disagree that any exception should save Virginia's law from unconstitutionality under the holding in *R. A. V.* or any acceptable variation of it.

I

The ordinance struck down in *R. A. V.*, as it had been construed by the State's highest court, prohibited the use of symbols (including but not limited to a burning cross) as the equivalent of generally proscribable fighting words, but the ordinance applied only when the symbol was provocative "‘on the basis of race, color, creed, religion or gender.’" *Id.*, at 380 (quoting *St. Paul, Minn., Legis. Code* § 292.02 (1990)). Although the Virginia statute in issue here contains no such express "basis of" limitation on prohibited subject matter, the specific prohibition of cross burning with intent to intimidate selects a symbol with particular content from the field of all proscribable expression meant to intimidate. To be sure, that content often includes an essentially intimidating message, that the cross burner will harm the victim, most probably in a physical way, given the historical identification of burning crosses with arson, beating, and lynching. But even when the symbolic act is meant to terrify, a burning cross may carry a further, ideological message of white Protestant supremacy. The ideological message not only accompanies many threatening uses of the symbol, but is also expressed when a burning cross is not used to threaten but merely to symbolize the supremacist ideology and the solidarity of those who espouse it. As the majority points out, the burning cross can broadcast threat and ideology together, ideology alone, or threat alone, as was apparently the choice of respondents Elliott and O'Mara. *Ante*, at 354–357, 363.

The issue is whether the statutory prohibition restricted to this symbol falls within one of the exceptions to *R. A. V.*'s general condemnation of limited content-based proscription

Opinion of SOUTER, J.

within a broader category of expression proscribable generally. Because of the burning cross's extraordinary force as a method of intimidation, the *R. A. V.* exception most likely to cover the statute is the first of the three mentioned there, which the *R. A. V.* opinion called an exception for content discrimination on a basis that "consists entirely of the very reason the entire class of speech at issue is proscribable." 505 U. S., at 388. This is the exception the majority speaks of here as covering statutes prohibiting "particularly virulent" proscribable expression. *Ante*, at 363.

I do not think that the Virginia statute qualifies for this virulence exception as *R. A. V.* explained it. The statute fits poorly with the illustrative examples given in *R. A. V.*, none of which involves communication generally associated with a particular message, and in fact, the majority's discussion of a special virulence exception here moves that exception toward a more flexible conception than the version in *R. A. V.* I will reserve judgment on that doctrinal development, for even on a pragmatic conception of *R. A. V.* and its exceptions the Virginia statute could not pass muster, the most obvious hurdle being the statute's *prima facie* evidence provision. That provision is essential to understanding why the statute's tendency to suppress a message disqualifies it from any rescue by exception from *R. A. V.*'s general rule.

II

R. A. V. defines the special virulence exception to the rule barring content-based subclasses of categorically proscribable expression this way: prohibition by subcategory is nonetheless constitutional if it is made "entirely" on the "basis" of "the very reason" that "the entire class of speech at issue is proscribable" at all. 505 U. S., at 388. The Court explained that when the subcategory is confined to the most obviously proscribable instances, "no significant danger of idea or viewpoint discrimination exists," *ibid.*, and the expla-

Opinion of SOUTER, J.

nation was rounded out with some illustrative examples. None of them, however, resembles the case before us.¹

The first example of permissible distinction is for a prohibition of obscenity unusually offensive “in its prurience,” *ibid.* (emphasis deleted), with citation to a case in which the Seventh Circuit discussed the difference between obscene depictions of actual people and simulations. As that court noted, distinguishing obscene publications on this basis does not suggest discrimination on the basis of the message conveyed. *Kucharek v. Hanaway*, 902 F. 2d 513, 517–518 (1990). The opposite is true, however, when a general prohibition of intimidation is rejected in favor of a distinct proscription of intimidation by cross burning. The cross may have been selected because of its special power to threaten, but it may also have been singled out because of disapproval of its message of white supremacy, either because a legislature thought white supremacy was a pernicious doctrine or because it found that dramatic, public espousal of it was a civic embarrassment. Thus, there is no kinship between the cross-burning statute and the core prurience example.

Nor does this case present any analogy to the statute prohibiting threats against the President, the second of *R. A. V.*’s examples of the virulence exception and the one the majority relies upon. *Ante*, at 362. The content discrimination in that statute relates to the addressee of the threat and reflects the special risks and costs associated with threatening the President. Again, however, threats against the President are not generally identified by reference to the content of any message that may accompany the threat, let alone any viewpoint, and there is no obvious correlation in fact between victim and message. Millions of statements are made about the President every day on every subject

¹ Although three examples are given, the third may be skipped here. It covers misleading advertising in a particular industry in which the risk of fraud is thought to be great, and thus deals with commercial speech with its separate doctrine and standards. *R. A. V.*, 505 U. S., at 388–389.

Opinion of SOUTER, J.

and from every standpoint; threats of violence are not an integral feature of any one subject or viewpoint as distinct from others. Differential treatment of threats against the President, then, selects nothing but special risks, not special messages. A content-based proscription of cross burning, on the other hand, may be a subtle effort to ban not only the intensity of the intimidation cross burning causes when done to threaten, but also the particular message of white supremacy that is broadcast even by nonthreatening cross burning.

I thus read *R. A. V.*'s examples of the particular virulence exception as covering prohibitions that are not clearly associated with a particular viewpoint, and that are consequently different from the Virginia statute. On that understanding of things, I necessarily read the majority opinion as treating *R. A. V.*'s virulence exception in a more flexible, pragmatic manner than the original illustrations would suggest. *Ante*, at 363. Actually, another way of looking at today's decision would see it as a slight modification of *R. A. V.*'s third exception, which allows content-based discrimination within a proscribable category when its "nature" is such "that there is no realistic possibility that official suppression of ideas is afoot." *R. A. V.*, *supra*, at 390. The majority's approach could be taken as recognizing an exception to *R. A. V.* when circumstances show that the statute's ostensibly valid reason for punishing particularly serious proscribable expression probably is not a ruse for message suppression, even though the statute may have a greater (but not exclusive) impact on adherents of one ideology than on others, *ante*, at 362–363.

III

My concern here, in any event, is not with the merit of a pragmatic doctrinal move. For whether or not the Court should conceive of exceptions to *R. A. V.*'s general rule in a more practical way, no content-based statute should survive even under a pragmatic recasting of *R. A. V.* without a high probability that no "official suppression of ideas is afoot,"

Opinion of SOUTER, J.

505 U. S., at 390. I believe the *prima facie* evidence provision stands in the way of any finding of such a high probability here.

Virginia's statute provides that burning a cross on the property of another, a highway, or other public place is "prima facie evidence of an intent to intimidate a person or group of persons." Va. Code Ann. § 18.2-423 (1996). While that language was added by amendment to the earlier portion of the statute criminalizing cross burning with intent to intimidate, *ante*, at 363 (plurality opinion), it was a part of the prohibitory statute at the time these respondents burned crosses, and the whole statute at the time of respondents' conduct is what counts for purposes of the First Amendment.

As I see the likely significance of the evidence provision, its primary effect is to skew jury deliberations toward conviction in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning. To understand how the provision may work, recall that the symbolic act of burning a cross, without more, is consistent with both intent to intimidate and intent to make an ideological statement free of any aim to threaten. *Ante*, at 354-357. One can tell the intimidating instance from the wholly ideological one only by reference to some further circumstance. In the real world, of course, and in real-world prosecutions, there will always be further circumstances, and the factfinder will always learn something more than the isolated fact of cross burning. Sometimes those circumstances will show an intent to intimidate, but sometimes they will be at least equivocal, as in cases where a white supremacist group burns a cross at an initiation ceremony or political rally visible to the public. In such a case, if the factfinder is aware of the *prima facie* evidence provision, as the jury was in respondent Black's case, *ante*, at 349-350, the provision will have the practical effect of tilting the jury's thinking in favor of the prosecution. What is significant is not that the provision

Opinion of SOUTER, J.

permits a factfinder's conclusion that the defendant acted with proscribable and punishable intent without any further indication, because some such indication will almost always be presented. What is significant is that the provision will encourage a factfinder to err on the side of a finding of intent to intimidate when the evidence of circumstances fails to point with any clarity either to the criminal intent or to the permissible one. The effect of such a distortion is difficult to remedy, since any guilty verdict will survive sufficiency review unless the defendant can show that, "viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The provision will thus tend to draw nonthreatening ideological expression within the ambit of the prohibition of intimidating expression, as JUSTICE O'CONNOR notes. *Ante*, at 365–366 (plurality opinion).

To the extent the *prima facie* evidence provision skews prosecutions, then, it skews the statute toward suppressing ideas. Thus, the appropriate way to consider the statute's *prima facie* evidence term, in my view, is not as if it were an overbroad statutory definition amenable to severance or a narrowing construction. The question here is not the permissible scope of an arguably overbroad statute, but the claim of a clearly content-based statute to an exception from the general prohibition of content-based proscriptions, an exception that is not warranted if the statute's terms show that suppression of ideas may be afoot. Accordingly, the way to look at the *prima facie* evidence provision is to consider it for any indication of what is afoot. And if we look at the provision for this purpose, it has a very obvious significance as a mechanism for bringing within the statute's prohibition some expression that is doubtfully threatening though certainly distasteful.

It is difficult to conceive of an intimidation case that could be easier to prove than one with cross burning, assum-

Opinion of SOUTER, J.

ing any circumstances suggesting intimidation are present. The provision, apparently so unnecessary to legitimate prosecution of intimidation, is therefore quite enough to raise the question whether Virginia's content-based statute seeks more than mere protection against a virulent form of intimidation. It consequently bars any conclusion that an exception to the general rule of *R. A. V.* is warranted on the ground "that there is no realistic [or little realistic] possibility that official suppression of ideas is afoot," 505 U. S., at 390.² Since no *R. A. V.* exception can save the statute as content based, it can only survive if narrowly tailored to serve a compelling state interest, *id.*, at 395–396, a stringent test the statute cannot pass; a content-neutral statute banning intimidation would achieve the same object without singling out particular content.

IV

I conclude that the statute under which all three of the respondents were prosecuted violates the First Amendment, since the statute's content-based distinction was invalid at the time of the charged activities, regardless of whether the prima facie evidence provision was given any effect in any respondent's individual case. In my view, severance of the prima facie evidence provision now could not eliminate the unconstitutionality of the whole statute at the time of the respondents' conduct. I would therefore affirm the judgment of the Supreme Court of Virginia vacating the respondents' convictions and dismissing the indictments. Accordingly, I concur in the Court's judgment as to respondent Black and dissent as to respondents Elliott and O'Mara.

²The same conclusion also goes for the second *R. A. V.* exception relating to "secondary effects." 505 U. S., at 389 (citing *Renton v. Playtime Theatres, Inc.*, 475 U. S. 41, 48 (1986)). Our "secondary effects" jurisprudence presupposes that the regulation at issue is "unrelated to the suppression of free expression." *Ibid.*

THOMAS, J., dissenting

JUSTICE THOMAS, dissenting.

In every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred, see *Texas v. Johnson*, 491 U.S. 397, 422–429 (1989) (REHNQUIST, C. J., dissenting) (describing the unique position of the American flag in our Nation’s 200 years of history), and the profane. I believe that cross burning is the paradigmatic example of the latter.

I

Although I agree with the majority’s conclusion that it is constitutionally permissible to “ban . . . cross burning carried out with the intent to intimidate,” *ante*, at 363, I believe that the majority errs in imputing an expressive component to the activity in question, see *ante*, at 362 (relying on one of the exceptions to the First Amendment’s prohibition on content-based discrimination outlined in *R. A. V. v. St. Paul*, 505 U.S. 377 (1992)). In my view, whatever expressive value cross burning has, the legislature simply wrote it out by banning only intimidating conduct undertaken by a particular means. A conclusion that the statute prohibiting cross burning with intent to intimidate sweeps beyond a prohibition on certain conduct into the zone of expression overlooks not only the words of the statute but also reality.

A

“In holding [the ban on cross burning with intent to intimidate] unconstitutional, the Court ignores Justice Holmes’ familiar aphorism that ‘a page of history is worth a volume of logic.’” *Texas v. Johnson, supra*, at 421 (REHNQUIST, C. J., dissenting) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

“The world’s oldest, most persistent terrorist organization is not European or even Middle Eastern in origin. Fifty years before the Irish Republican Army was orga-

THOMAS, J., dissenting

nized, a century before Al Fatah declared its holy war on Israel, the Ku Klux Klan was actively harassing, torturing, and murdering in the United States. Today . . . its members remain fanatically committed to a course of violent opposition to social progress and racial equality in the United States.” M. Newton & J. Newton, *The Ku Klux Klan: An Encyclopedia* vii (1991) (hereinafter Newton & Newton).

To me, the majority’s brief history of the Ku Klux Klan only reinforces this common understanding of the Klan as a terrorist organization, which, in its endeavor to intimidate, or even eliminate those it dislikes, uses the most brutal of methods.

Such methods typically include cross burning—“a tool for the intimidation and harassment of racial minorities, Catholics, Jews, Communists, and any other groups hated by the Klan.” *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U. S. 753, 770 (1995) (THOMAS, J., concurring). For those not easily frightened, cross burning has been followed by more extreme measures, such as beatings and murder. J. Williams, *Eyes on the Prize: America’s Civil Rights Years, 1954–1965*, p. 39 (1987). As the Government points out, the association between acts of intimidating cross burning and violence is well documented in recent American history. Brief for United States as *Amicus Curiae* 3–4, and n. 2.¹

¹ *United States v. Guest*, 383 U. S. 745, 747–748, n. 1 (1966) (quoting indictment charging conspiracy under 18 U. S. C. § 241 (1964 ed.) to interfere with federally secured rights by, *inter alia*, “burning crosses at night in public view,” “shooting Negroes,” “beating Negroes,” “killing Negroes,” “damaging and destroying property of Negroes,” and “pursuing Negroes in automobiles and threatening them with guns”); *United States v. Pospisil*, 186 F. 3d 1023, 1027 (CA8 1999) (defendants burned a cross in victims’ yard, slashed their tires, and fired guns), cert. denied, 529 U. S. 1089 (2000); *United States v. Stewart*, 65 F. 3d 918, 922 (CA11 1995) (cross burning precipitated an exchange of gunfire between victim and perpetrators), cert. denied *sub nom. Daniel v. United States*, 516 U. S. 1134 (1996); *United States v. McDermott*, 29 F. 3d 404, 405 (CA8 1994) (defendants

THOMAS, J., dissenting

Indeed, the connection between cross burning and violence is well ingrained, and lower courts have so recognized:

“After the mother saw the burning cross, she was crying on her knees in the living room. [She] felt feelings of frustration and intimidation and feared for her husband’s life. She testified what the burning cross symbolized to her as a black American: ‘Nothing good. Murder, hanging, rape, lynching. Just anything bad

sought to discourage blacks from using public park by burning a cross in the park, as well as by “waving baseball bats, axe handles, and knives; throwing rocks and bottles; veering cars towards black persons; and physically chasing black persons out of the park”); *Cox v. State*, 585 So. 2d 182, 202 (Ala. Crim. App. 1991) (defendant participated in evening of cross burning and murder), cert. denied, 503 U. S. 987 (1992); R. Caro, *The Years of Lyndon Johnson: Master of the Senate* 847 (2002) (referring to a wave of “southern bombings, beatings, sniper fire, and cross-burnings” in late 1956 in response to efforts to desegregate schools, buses, and parks); *Newton & Newton* 21 (observing that “Jewish merchants were subjected to boycotts, threats, cross burnings, and sometimes acts of violence” by the Klan and its sympathizers); *id.*, at 361–362 (describing cross burning and beatings directed at a black family that refused demands to sell the home); *id.*, at 382 (describing incident of cross burning and brick throwing at home of Jewish officeholder); *id.*, at 583 (describing campaign of cross burning and property damage directed at Vietnamese immigrant fishermen); W. Wade, *The Fiery Cross: The Ku Klux Klan in America* 262–263 (1987) (describing incidents of cross burning, beatings, kidnapping, and other “terrorism” directed against union organizers in the South); *id.*, at 376 (cross burnings associated with shooting into cars); *id.*, at 377 (cross burnings associated with assaults on blacks); 1 R. Kluger, *Simple Justice* 378 (1975) (describing cross burning at, and subsequent shooting into, home of federal judge who issued desegregation decisions); Rubinowitz & Perry, *Crimes Without Punishment: White Neighbors’ Resistance to Black Entry*, 92 J. Crim. L. & C. 335, 342, 354–355, 388, 408–410, 419, 420, 421, 423 (Fall 2001–Winter 2002) (noting that an “escalating campaign to eject a [minority] family” from a white neighborhood could begin with “cross burnings, window breaking, or threatening telephone calls,” and culminate with bombings; describing other incidents of cross burning accompanied by violence); *Cross Burned at Manakin, Third in Area*, *Richmond Times-Dispatch*, Feb. 26, 1951, p. 4, App. 318 (describing 1951 Virginia cross burning accompanied by gunfire).

THOMAS, J., dissenting

that you can name. It is the worst thing that could happen to a person.' . . . Mr. Heisser told the probation officer that at the time of the occurrence, if the family did not leave, he believed someone would return to commit murder. . . . *Seven months after the incident, the family still lived in fear. . . . This is a reaction reasonably to be anticipated from this criminal conduct.*" *United States v. Skillman*, 922 F.2d 1370, 1378 (CA9 1991) (emphasis added).

But the perception that a burning cross is a threat and a precursor of worse things to come is not limited to blacks. Because the modern Klan expanded the list of its enemies beyond blacks and "radical[s]" to include Catholics, Jews, most immigrants, and labor unions, *Newton & Newton* ix, a burning cross is now widely viewed as a signal of impending terror and lawlessness. I wholeheartedly agree with the observation made by the Commonwealth of Virginia:

"A white, conservative, middle-class Protestant, waking up at night to find a burning cross outside his home, will reasonably understand that someone is threatening him. His reaction is likely to be very different than if he were to find, say, a burning circle or square. In the latter case, he may call the fire department. In the former, he will probably call the police." Brief for Petitioner 26.

In our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.

B

Virginia's experience has been no exception. In Virginia, though facing widespread opposition in the 1920's, the Klan developed localized strength in the southeastern part of the Commonwealth, where there were reports of scattered raids and floggings. *Newton & Newton* 585. Although the Klan was disbanded at the national level in 1944, *ibid.*, a series of

THOMAS, J., dissenting

cross burnings in Virginia took place between 1949 and 1952. See 262 Va. 764, 771, n. 2, 553 S. E. 2d 738, 742, n. 2 (2001) (collecting newspaper accounts of cross burnings in Virginia during that time period); see also Cross Fired Near Suffolk Stirs Probe, Burning Second in Past Week, Richmond Times-Dispatch, Jan. 23, 1949, section 2, p. 1, App. 313, 314–315 (The second reported cross burning within a week in 1949 “brought to eight the number which have occurred in Virginia during the past year. Six of the incidents have occurred in Nansemond County. Four crosses were burned near Suffolk last Spring, and about 150 persons took part in the December 11 cross burning near Whaleyville. No arrests have been made in connection with any of the incidents”).

Most of the crosses were burned on the lawns of black families, who either were business owners or lived in predominantly white neighborhoods. See Police Aid Requested by Teacher, Cross is Burned in Negro’s Yard, Richmond News Leader, Jan. 21, 1949, p. 19, App. 312; Cross Fired Near Suffolk Stirs Probe, Burning Second in Past Week, *supra*, at 313; Cross is Burned at Reedville Home, Richmond News Leader, Apr. 14, 1951, p. 1, App. 321. At least one of the cross burnings was accompanied by a shooting. Cross Burned at Manakin, Third in Area, *supra* n. 1, at 318. The crosses burned near residences were about five to six feet tall, while a “huge cross reminiscent of the Ku Klux Klan days” that burned “atop a hill” as part of the initiation ceremony of the secret organization of the Knights of Kavaliers was 12 feet tall. Huge Cross is Burned on Hill Just South of Covington, Richmond Times-Dispatch, Apr. 14, 1950, p. 6, App. 316. These incidents were, in the words of the time, “*terroristic [sic]*” and “un-American act[s], designed to *intimidate* Negroes from seeking their rights as citizens.” Cross Fired Near Suffolk Stirs Probe, Burning Second in Past Week, *supra*, at 315 (emphasis added).

THOMAS, J., dissenting

In February 1952, in light of this series of cross burnings and attendant reports that the Klan, “long considered dead in Virginia, is being revitalized in Richmond,” Governor Battle announced that “Virginia ‘might well consider passing legislation’ to restrict the activities of the Ku Klux Klan.” “State Might Well Consider” Restrictions on Ku Klux Klan, Governor Battle Comments, Richmond Times-Dispatch, Feb. 6, 1952, p. 7, App. 321. As newspapers reported at the time, the bill was “to ban the burning of crosses and other similar evidences of *terrorism*.” Name Rider Approved by House, Richmond News Leader, Feb. 23, 1952, p. 1, App. 325 (emphasis added). The bill was presented to the House of Delegates by a former FBI agent and future two-term Governor, Delegate Mills E. Godwin, Jr. “Godwin said law and order in the State were impossible if organized groups could *create fear by intimidation*.” Bill to Curb KKK Passed By the House, Action is Taken Without Debate, Richmond Times-Dispatch, Mar. 8, 1952, p. 5, App. 325 (emphasis added).

That in the early 1950’s the people of Virginia viewed cross burning as creating an intolerable atmosphere of terror is not surprising: Although the cross took on some religious significance in the 1920’s when the Klan became connected with certain southern white clergy, by the postwar period it had reverted to its original function “as an instrument of intimidation.” W. Wade, *The Fiery Cross: The Ku Klux Klan in America* 185, 279 (1987).

Strengthening Delegate Godwin’s explanation, as well as my conclusion, that the legislature sought to criminalize terrorizing *conduct* is the fact that at the time the statute was enacted, racial segregation was not only the prevailing practice, but also the law in Virginia.² And, just two years

² See, e. g., Va. Code Ann. § 18–327 (1950) (repealed 1960) (required separation of “white” and “colored” at any place of entertainment or other public assemblage; violation was misdemeanor); Va. Code Ann. § 20–54 (1960) (repealed 1968) (prohibited racial intermarriage); Va. Code Ann. § 22–221 (1969) (repealed 1972) (“White and colored persons shall not be

THOMAS, J., dissenting

after the enactment of this statute, Virginia's General Assembly embarked on a campaign of "massive resistance" in response to *Brown v. Board of Education*, 347 U. S. 483 (1954). See generally *Griffin v. School Bd. of Prince Edward Cty.*, 377 U. S. 218, 221 (1964); *Harrison v. Day*, 200 Va. 439, 448–454, 106 S. E. 2d 636, 644–648 (1959) (describing massive resistance as legislatively mandated attempt to close public schools rather than desegregate).

It strains credulity to suggest that a state legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch the segregationist message. Even for segregationists, violent and terroristic conduct, the Siamese twin of cross burning, was intolerable. The ban on cross burning with intent to intimidate demonstrates that even segregationists understood the difference between intimidating and terroristic conduct and racist expression. It is simply beyond belief that, in passing the statute now under review, the Virginia Legislature was concerned with anything but penalizing conduct it must have viewed as particularly vicious.

Accordingly, this statute prohibits only conduct, not expression. And, just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point. In light of my conclusion that

taught in the same school"); Va. Code Ann. §24–120 (1969) (repealed 1970) (required separate listings for "white and colored persons" who failed to pay poll tax); Va. Code Ann. §38–281 (1950) (repealed 1952) (prohibited fraternal associations from having "both white and colored members"); Va. Code Ann. §53–42 (1967) (amended to remove "race" 1968) (required racial separation in prison); Va. Code Ann. §56–114 (1974) (repealed 1975) (authorized State Corporation Commission to require "separate waiting rooms" for "white and colored races"); Va. Code Ann. §56–326 (1969) (repealed 1970) (required motor carriers to "separate" their "white and colored passengers," violation was misdemeanor); §§56–390 and 56–396 (repealed 1970) (same for railroads); §58–880 (repealed 1970) (required separate personal property tax books for "white[s]" and "colored").

THOMAS, J., dissenting

the statute here addresses only conduct, there is no need to analyze it under any of our First Amendment tests.

II

Even assuming that the statute implicates the First Amendment, in my view, the fact that the statute permits a jury to draw an inference of intent to intimidate from the cross burning itself presents no constitutional problems. Therein lies my primary disagreement with the plurality.

A

“The threshold inquiry in ascertaining the constitutional analysis applicable to [a jury instruction involving a presumption] is to determine the nature of the presumption it describes.” *Francis v. Franklin*, 471 U.S. 307, 313–314 (1985) (internal quotation marks omitted). We have categorized the presumptions as either permissive inferences or mandatory presumptions. *Id.*, at 314.

To the extent we do have a construction of this statute by the Virginia Supreme Court, we know that both the majority and the dissent agreed that the presumption was “a statutorily supplied *inference*,” 262 Va., at 778, 553 S. E. 2d, at 746 (emphasis added); *id.*, at 795, 553 S. E. 2d, at 755 (Hassell, J., dissenting) (“Code § 18.2–423 creates a statutory *inference*” (emphasis added)). Under Virginia law, the term “inference” has a well-defined meaning and is distinct from the term “presumption.” *Martin v. Phillips*, 235 Va. 523, 526, 369 S. E. 2d 397, 399 (1988).

“A presumption is a rule of law that compels the fact finder to draw a certain conclusion or a certain inference from a given set of facts.¹ The primary significance of a presumption is that it operates to shift to the opposing party the burden of producing evidence tending to rebut the presumption.² No presumption, however, can operate to shift the ultimate burden of persuasion from the party upon whom it was originally cast.

THOMAS, J., dissenting

"In contrast, an inference, sometimes loosely referred to as a presumption of fact, does not compel a specific conclusion. An inference merely applies to the rational potency or probative value of an evidentiary fact to which the fact finder may attach whatever force or weight it deems best. 9 J. Wigmore, Evidence in Trials at Common Law §2491(1), at 304 (Chad. rev. 1981).

"2An inference, on the other hand, does not invoke this procedural consequence of shifting the burden of production. Id."

Ibid. (some citations omitted; emphasis added).

Both the majority and the dissent below classified the clause in question as an "inference," and I see no reason to disagree, particularly in light of the instructions given to the jury in Black's case, requiring it to find guilt beyond a reasonable doubt both as to the fact that "the defendant burned or caused to be burned a cross in a public place," and that "he did so with the intent to intimidate any person or group of persons," 262 Va., at 796, 553 S. E. 2d, at 756 (Hassell, J., dissenting) (quoting jury instructions in Black's case).

Even though under Virginia law the statutory provision at issue here is characterized as an "inference," the Court must still inquire whether the label Virginia attaches corresponds to the categorization our cases have given such clauses. In this respect, it is crucial to observe that what Virginia law calls an "inference" is what our cases have termed a "permissive inference or presumption." *County Court of Ulster Cty. v. Allen*, 442 U.S. 140, 157 (1979).³ Given that this

³ As the Court explained in *Allen*, a permissive inference or presumption "allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. In that situation the basic fact may constitute prima facie evidence of the elemental fact. . . . Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permit-

THOMAS, J., dissenting

Court's definitions of a "permissive inference" and a "mandatory presumption" track Virginia's definitions of "inference" and "presumption," the Court should judge the Virginia statute based on the constitutional analysis applicable to "inferences": they raise no constitutional flags unless there is "no rational way the trier could make the connection permitted by the inference." *Ibid.* As explained in Part I, *supra*, not making a connection between cross burning and intimidation would be irrational.

But even with respect to statutes containing a mandatory irrebuttable presumption as to intent, the Court has not shown much concern. For instance, there is no scienter requirement for statutory rape. See, *e. g.*, Tenn. Code Ann. § 39-13-506 (1997); Ore. Rev. Stat. Ann. § 163.365 (1989); Mo. Rev. Stat. § 566.032 (2000); Ga. Code Ann. § 16-6-3 (1996). That is, a person can be arrested, prosecuted, and convicted for having sex with a minor, without the government ever producing any evidence, let alone proving beyond a reasonable doubt, that a minor did not consent. In fact, "[f]or purposes of the child molesting statute . . . consent is irrelevant. The legislature has determined in such cases that children under the age of sixteen (16) cannot, as a matter of law, consent to have sexual acts performed upon them, or consent to engage in a sexual act with someone over the age of sixteen (16)." *Warrick v. State*, 538 N. E. 2d 952, 954 (Ind. App. 1989) (citing Ind. Code § 35-42-4-3 (1988)). The legislature finds the behavior so reprehensible that the intent is satisfied by the mere act committed by a perpetrator. Considering

ted by the inference." 442 U. S., at 157 (citations omitted). By contrast, "[a] mandatory presumption . . . may affect not only the strength of the 'no reasonable doubt' burden but also the placement of that burden; it tells the trier that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts." *Ibid.*

THOMAS, J., dissenting

the horrific effect cross burning has on its victims, it is also reasonable to presume intent to intimidate from the act itself.

Statutes prohibiting possession of drugs with intent to distribute operate much the same way as statutory rape laws. Under these statutes, the intent to distribute is effectively satisfied by possession of some threshold amount of drugs. See, *e. g.*, Del. Code Ann., Tit. 16, § 4753A (1987); Mass. Gen. Laws, ch. 94C, § 32E (West 1997); S. C. Code Ann. § 44-53-370 (West 2000). As with statutory rape, the presumption of intent in such statutes is irrebuttable—not only can a person be arrested for the crime of possession with intent to distribute (or “trafficking”) without any evidence of intent beyond quantity of drugs, but such person cannot even mount a defense to the element of intent. However, as with statutory rape statutes, our cases do not reveal any controversy with respect to the presumption of intent in these drug statutes.

Because the *prima facie* clause here is an inference, not an irrebuttable presumption, there is all the more basis under our due process precedents to sustain this statute.

B

The plurality, however, is troubled by the presumption because this is a First Amendment case. The plurality laments the fate of an innocent cross burner who burns a cross, but does so without an intent to intimidate. The plurality fears the chill on expression because, according to the plurality, the inference permits “the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.” *Ante*, at 365. First, it is, at the very least, unclear that the inference comes into play during arrest and initiation of a prosecution, that is, prior to the instructions stage of an actual trial. Second, as I explained above, the inference is rebuttable and, as the jury instructions given in this case demonstrate, Virginia law still re-

THOMAS, J., dissenting

quires the jury to find the existence of each element, including intent to intimidate, beyond a reasonable doubt.

Moreover, even in the First Amendment context, the Court has upheld such regulations where conduct that initially appears culpable ultimately results in dismissed charges. A regulation of pornography is one such example. While possession of child pornography is illegal, *New York v. Ferber*, 458 U. S. 747, 764 (1982), possession of adult pornography, as long as it is not obscene, is allowed, *Miller v. California*, 413 U. S. 15 (1973). As a result, those pornographers trafficking in images of adults who look like minors may be not only deterred but also arrested and prosecuted for possessing what a jury might find to be legal materials. This “chilling” effect has not, however, been a cause for grave concern with respect to overbreadth of such statutes among the Members of this Court.

That the First Amendment gives way to other interests is not a remarkable proposition. What is remarkable is that, under the plurality’s analysis, the determination whether an interest is sufficiently compelling depends not on the harm a regulation in question seeks to prevent, but on the area of society at which it aims. For instance, in *Hill v. Colorado*, 530 U. S. 703 (2000), the Court upheld a restriction on protests near abortion clinics, explaining that the State had a legitimate interest, which was sufficiently narrowly tailored, in protecting those seeking services of such establishments from “unwanted advice” and “unwanted communication,” *id.*, at 708, 716, 717, 729. In so concluding, the Court placed heavy reliance on the “vulnerable physical and emotional conditions” of patients. *Id.*, at 729. Thus, when it came to the rights of those seeking abortions, the Court deemed restrictions on “unwanted advice,” which, notably, can be given only from a distance of at least eight feet from a prospective patient, justified by the countervailing interest in obtaining an abortion. Yet, here, the plurality strikes down the statute because one day an individual might wish to burn a cross,

THOMAS, J., dissenting

but might do so without an intent to intimidate anyone. That cross burning subjects its targets, and, sometimes, an unintended audience, see 262 Va., at 782, 553 S. E. 2d, at 748–749 (Hassell, J., dissenting); see also App. 93–97, to extreme emotional distress, and is virtually never viewed merely as “unwanted communication,” but rather, as a physical threat, is of no concern to the plurality. Henceforth, under the plurality’s view, physical safety will be valued less than the right to be free from unwanted communications.

III

Because I would uphold the validity of this statute, I respectfully dissent.



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (PLENARY)

CASE OF THE SUNDAY TIMES v. THE UNITED KINGDOM (No. 2)

(Application no. 13166/87)

JUDGMENT

STRASBOURG

26 November 1991

In the case of *The Sunday Times v. the United Kingdom (no. 2),**

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 51 of the Rules of Court** and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr J. PINHEIRO FARINHA,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr S. K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr J. M. MORENILLA,
Mr F. BIGI,
Mr A. BAKA,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 28 June and 24 October 1991,

Delivers the following judgment, which was adopted on the last-mentioned date:

* Notes by the Registrar

The case is numbered 50/1990/241/312. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** The amended Rules of Court which entered into force on 1 April 1989 are applicable to the present case.

PROCEDURE

1. The case was referred to the Court on 12 October 1990 by the European Commission of Human Rights ("the Commission") and on 23 November 1990 by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government"), within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 13166/87) against the United Kingdom lodged with the Commission under Article 25 (art. 25) on 31 July 1987 by Times Newspapers Ltd, a company incorporated in England, and Mr Andrew Neil, a British citizen.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46) and the Government's application, to Article 48 (art. 48). The object of the request and the application was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10) and also, in the case of the request, Articles 13 and 14 (art. 13, art. 14) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30).

3. On 15 October 1990 the President of the Court decided, under Rule 21 para. 6 and in the interest of the proper administration of justice, that a single Chamber should be constituted to consider both the instant case and the Observer and Guardian case^{***}.

The Chamber thus constituted included ex officio Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 26 October 1990 the President drew by lot, in the presence of the Registrar, the names of the seven other members, namely Mr J. Cremona, Mrs D. Bindschedler-Robert, Mr F. Matscher, Mr R. Macdonald, Mr C. Russo, Mr R. Bernhardt and Mr R. Pekkanen (Article 43^{****} in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the representatives of the applicants on

^{***} Note by the Registrar
Case no. 51/1990/242/313

^{****} Note by the Registrar

As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

the need for a written procedure (Rule 37 para. 1) and the date of the opening of the oral proceedings (Rule 38).

In accordance with the President's orders and directions, the registry received, on 2 April 1991, the applicants' memorial and, on 18 April, the Government's. By letter of 31 May 1991, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 21 March 1991 the Chamber decided, pursuant to Rule 51, to relinquish jurisdiction forthwith in favour of the plenary Court.

6. On 25 March 1991 the President granted, under Rule 37 para. 2, leave to "Article 19" (the International Centre against Censorship) to submit written comments on a specific issue arising in the case. He directed that the comments should be filed by 15 May 1991; they were, in fact, received on that date.

7. As directed by the President, the hearing, devoted to the present and the Observer and Guardian cases, took place in public in the Human Rights Building, Strasbourg, on 25 June 1991. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mrs A. GLOVER, Legal Counsellor,

Foreign and Commonwealth Office,

Agent,

Mr N. BRATZA, Q.C.,

Mr P. HAVERS, Barrister-at-Law,

Counsel,

Mrs S. EVANS, Home Office,

Mr D. BRUMMELL, Treasury Solicitor,

Advisers;

- for the Commission

Mr E. BUSUTTIL,

Delegate;

- for the applicants in the present case

Mr A. LESTER, Q.C.,

Mr D. PANNICK, Barrister-at-Law,

Counsel,

Mr M. KRAMER,

Ms K. RIMELL, Solicitors,

Mr A. WHITAKER, Legal Manager,

Times Newspapers Ltd,

Adviser;

- for the applicants in the Observer and Guardian case

Mr D. BROWNE, Q.C.,

Counsel,

Mrs J. MCDERMOTT, Solicitor.

The Court heard addresses by Mr Bratza for the Government, by Mr Busuttil for the Commission and by Mr Lester and Mr Browne for the applicants, as well as replies to questions put by the President of the Court.

8. The registry received, on 5 August 1991, the observations of the Government on the applicants' claim under Article 50 (art. 50) of the Convention and, on 13 September and on 4 and 7 October respectively, the

applicants' comments on those observations and further particulars of their claim. By letter of 3 October, a Deputy to the Secretary to the Commission informed the Registrar that the Delegate had no comments on this issue.

AS TO THE FACTS

I. INTRODUCTION

A. The applicants

9. The applicants in this case (who are hereinafter together referred to as "S.T.") are Times Newspapers Ltd, the publisher of the United Kingdom national Sunday newspaper The Sunday Times, and Mr Andrew Neil, its editor. They complain of interlocutory injunctions imposed by the English courts on the publication of details of the book *Spycatcher* and information obtained from its author, Mr Peter Wright.

B. Interlocutory injunctions

10. In litigation where the plaintiff seeks a permanent injunction against the defendant, the English courts have a discretion to grant the plaintiff an "interlocutory injunction" (a temporary restriction pending the determination of the dispute at the substantive trial) which is designed to protect his position in the interim. In that event the plaintiff will normally be required to give an undertaking to pay damages to the defendant should the latter succeed at the trial.

The principles on which such injunctions will be granted - to which reference was made in the proceedings in the present case - were set out in *American Cyanamid Co. v. Ethicon Ltd* ([1975] Appeal Cases 396) and may be summarised as follows.

(a) It is not for the court at the interlocutory stage to seek to determine disputed issues of fact or to decide difficult questions of law which call for detailed argument and mature consideration.

(b) Unless the material before the court at that stage fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction, the court should consider, in the light of the particular circumstances of the case, whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

(c) If damages would be an adequate remedy for the plaintiff if he were to succeed at the trial, no interlocutory injunction should normally be

granted. If, on the other hand, damages would not provide an adequate remedy for the plaintiff but would adequately compensate the defendant under the plaintiff's undertaking if the defendant were to succeed at the trial, there would be no reason to refuse an interlocutory injunction on this ground.

(d) It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience arises.

(e) Where other factors appear evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo.

C. Spycatcher

11. Mr Peter Wright was employed by the British Government as a senior member of the British Security Service (MI5) from 1955 to 1976, when he resigned. Subsequently, without any authority from his former employers, he wrote his memoirs, entitled *Spycatcher*, and made arrangements for their publication in Australia, where he was then living. The book dealt with the operational organisation, methods and personnel of MI5 and also included an account of alleged illegal activities by the Security Service. He asserted therein, inter alia, that MI5 conducted unlawful activities calculated to undermine the 1974-1979 Labour Government, burgled and "bugged" the embassies of allied and hostile countries and planned and participated in other unlawful and covert activities at home and abroad, and that Sir Roger Hollis, who led MI5 during the latter part of Mr Wright's employment, was a Soviet agent.

Mr Wright had previously sought, unsuccessfully, to persuade the British Government to institute an independent inquiry into these allegations. In 1987 such an inquiry was also sought by, amongst others, a number of prominent members of the 1974-1979 Labour Government, but in vain.

12. Part of the material in *Spycatcher* had already been published in a number of books about the Security Service written by Mr Chapman Pincher. Moreover, in July 1984 Mr Wright had given a lengthy interview to Granada Television (an independent television company operating in the United Kingdom) about the work of the service and the programme was shown again in December 1986. Other books and another television programme on the workings and secrets of the service were produced at about the same time, but little Government action was taken against the authors or the media.

D. Institution of proceedings in Australia

13. In September 1985 the Attorney General of England and Wales ("the Attorney General") instituted, on behalf of the United Kingdom

Government, proceedings in the Equity Division of the Supreme Court of New South Wales, Australia, to restrain publication of *Spycatcher* and of any information therein derived from Mr Wright's work for the Security Service. The claim was based not on official secrecy but on the ground that the disclosure of such information by Mr Wright would constitute a breach of, notably, his duty of confidentiality under the terms of his employment. On 17 September he and his publishers, Heinemann Publishers Australia Pty Ltd, gave undertakings, by which they abided, not to publish pending the hearing of the Government's claim for an injunction.

Throughout the Australian proceedings the Government objected to the book as such; they declined to indicate which passages they objected to as being detrimental to national security.

II. THE INTERLOCUTORY PROCEEDINGS IN ENGLAND AND EVENTS OCCURRING WHILST THEY WERE IN PROGRESS

A. The Observer and Guardian articles and the ensuing injunctions

14. Whilst the Australian proceedings were still pending, the United Kingdom national Sunday newspaper *Observer* and the United Kingdom national daily newspaper *The Guardian* published, on Sunday 22 and Monday 23 June 1986 respectively, short articles on inside pages reporting on the forthcoming hearing in Australia and giving details of some of the contents of the manuscript of *Spycatcher*. These two newspapers had for some time been conducting a campaign for an independent investigation into the workings of the Security Service. The details given included the following allegations of improper, criminal and unconstitutional conduct on the part of MI5 officers:

(a) MI5 "bugged" all diplomatic conferences at Lancaster House in London throughout the 1950's and 1960's, as well as the Zimbabwe independence negotiations in 1979;

(b) MI5 "bugged" diplomats from France, Germany, Greece and Indonesia, as well as Mr Krushchev's hotel suite during his visit to Britain in the 1950's, and was guilty of routine burglary and "bugging" (including the entering of Soviet consulates abroad);

(c) MI5 plotted unsuccessfully to assassinate President Nasser of Egypt at the time of the Suez crisis;

(d) MI5 plotted against Harold Wilson during his premiership from 1974 to 1976;

(e) MI5 (contrary to its guidelines) diverted its resources to investigate left-wing political groups in Britain.

The *Observer* and *Guardian* articles, which were written by Mr David Leigh and Mr Paul Lashmar and by Mr Richard Norton-Taylor respectively,

were based on investigations by these journalists from confidential sources and not on generally available international press releases or similar material. However, much of the actual information in the articles had already been published elsewhere (see paragraph 12 above). The English courts subsequently inferred that, on the balance of probabilities, the journalists' sources must have come from the offices of the publishers of Spycatcher or the solicitors acting for them and the author (see the judgment of 21 December 1987 of Mr Justice Scott; paragraph 40 below).

15. The Attorney General instituted proceedings for breach of confidence in the Chancery Division of the High Court of Justice of England and Wales against The Observer Ltd, the proprietors and publishers of the Observer, Mr Donald Trelford, its editor, and Mr Leigh and Mr Lashmar, and against Guardian Newspapers Ltd, the proprietors and publishers of The Guardian, Mr Peter Preston, its editor, and Mr Norton-Taylor.

The Attorney General sought permanent injunctions against the defendants (who are hereinafter together referred to as "O.G."), restraining them from making any publication of Spycatcher material. He based his claim on the principle that the information in the memoirs was confidential and that a third party coming into possession of information knowing that it originated from a breach of confidence owed the same duty to the original confider as that owed by the original confidant. It was accepted that an award of damages would have been an insufficient and inappropriate remedy for the Attorney General and that only an injunction would serve his purpose.

16. The evidential basis for the Attorney General's claim was two affidavits sworn by Sir Robert Armstrong, Secretary to the British Cabinet, in the Australian proceedings on 9 and 27 September 1985. He had stated therein, *inter alia*, that the publication of any narrative based on information available to Mr Wright as a member of the Security Service would cause unquantifiable damage, both to the service itself and to its officers and other persons identified, by reason of the disclosures involved. It would also undermine the confidence that friendly countries and other organisations and persons had in the Security Service and create a risk of other employees or former employees of that service seeking to publish similar information.

17. On 27 June 1986 *ex parte* interim injunctions were granted to the Attorney General restraining any further publication of the kind in question pending the substantive trial of the actions. On an application by O.G. and after an *inter partes* hearing on 11 July, Mr Justice Millett (sitting in the Chancery Division) decided that these injunctions should remain in force, but with various modifications. The defendants were given liberty to apply to vary or discharge the orders on giving twenty-four hours' notice.

18. The reasons for Mr Justice Millett's decision may be briefly summarised as follows.

(a) Disclosure by Mr Wright of information acquired as a member of the Security Service would constitute a breach of his duty of confidentiality.

(b) O.G. wished to be free to publish further information deriving directly or indirectly from Mr Wright and disclosing alleged unlawful activity on the part of the Security Service, whether or not it had been previously published.

(c) Neither the right to freedom of speech nor the right to prevent the disclosure of information received in confidence was absolute.

(d) In resolving, as in the present case, a conflict between the public interest in preventing and the public interest in allowing such disclosure, the court had to take into account all relevant considerations, including the facts that this was an interlocutory application and not the trial of the action, that the injunctions sought at this stage were only temporary and that the refusal of injunctive relief might cause irreparable harm and effectively deprive the Attorney General of his rights. In such circumstances, the conflict should be resolved in favour of restraint, unless the court was satisfied that there was a serious defence of public interest that might succeed at the trial: an example would be when the proposed publication related to unlawful acts, the disclosure of which was required in the public interest. This could be regarded either as an exception to the American Cyanamid principles (see paragraph 10 above) or their application in special circumstances where the public interest was invoked on both sides.

(e) The Attorney General's principal objection was not to the dissemination of allegations about the Security Service but to the fact that those allegations were made by one of its former employees, it being that particular fact which O.G. wished to publish. There was credible evidence (in the shape of Sir Robert Armstrong's affidavits; see paragraph 16 above) that the appearance of confidentiality was essential to the operation of the Security Service and that the efficient discharge of its duties would be impaired, with consequent danger to national security, if senior officers were known to be free to disclose what they had learned whilst employed by it. Although this evidence remained to be tested at the substantive trial, the refusal of an interlocutory injunction would permit indirect publication and permanently deprive the Attorney General of his rights at the trial. Bearing in mind, *inter alia*, that the alleged unlawful activities had occurred some time in the past, there was, moreover, no compelling interest requiring publication immediately rather than after the trial.

In the subsequent stages of the interlocutory proceedings, both the Court of Appeal (see paragraphs 19 and 34 below) and all the members of the Appellate Committee of the House of Lords (see paragraphs 35-36 below) considered that this initial grant of interim injunctions by Mr Justice Millett was justified.

19. On 25 July 1986 the Court of Appeal dismissed an appeal by O.G. and upheld the injunctions, with minor modifications. It referred to the

American Cyanamid principles (see paragraph 10 above) and considered that Mr Justice Millett had not misdirected himself or exercised his discretion on an erroneous basis. It refused leave to appeal to the House of Lords. It also certified the case as fit for a speedy trial.

As amended by the Court of Appeal, the injunctions ("the Millett injunctions") restrained O.G., until the trial of the action or further order, from:

"1. disclosing or publishing or causing or permitting to be disclosed or published to any person any information obtained by Peter Maurice Wright in his capacity as a member of the British Security Service and which they know, or have reasonable grounds to believe, to have come or been obtained, whether directly or indirectly, from the said Peter Maurice Wright;

2. attributing in any disclosure or publication made by them to any person any information concerning the British Security Service to the said Peter Maurice Wright whether by name or otherwise."

The orders contained the following provisos:

"1. this Order shall not prohibit direct quotation of attributions to Peter Maurice Wright already made by Mr Chapman Pincher in published works, or in a television programme or programmes broadcast by Granada Television;

2. no breach of this Order shall be constituted by the disclosure or publication of any material disclosed in open court in the Supreme Court of New South Wales unless prohibited by the Judge there sitting or which, after the trial there in action no. 4382 of 1985, is not prohibited from publication;

3. no breach of this Order shall be constituted by a fair and accurate report of proceedings in (a) either House of Parliament in the United Kingdom whose publication is permitted by that House; or (b) a court of the United Kingdom sitting in public."

20. On 6 November 1986 the Appellate Committee of the House of Lords granted leave to appeal against the Court of Appeal's decision. The appeal was subsequently withdrawn in the light of the House of Lords decision of 30 July 1987 (see paragraphs 35-36 below).

B. The first-instance decision in Australia

21. The trial of the Government's action in Australia (see paragraph 13 above) took place in November and December 1986. The proceedings were reported in detail in the media in the United Kingdom and elsewhere. In a judgment delivered on 13 March 1987 Mr Justice Powell rejected the Attorney General's claim against Mr Wright and his publishers, holding that much of the information in *Spycatcher* was no longer confidential and that publication of the remainder would not be detrimental to the British Government or the Security Service. The undertakings not to publish were then discharged by order of the court.

The Attorney General lodged an appeal; after a hearing in the New South Wales Court of Appeal in the week of 27 July 1987, judgment was reserved. The defendants had given further undertakings not to publish whilst the appeal was pending.

C. Further press reports concerning Spycatcher; the Independent case

22. On 27 April 1987 a major summary of certain of the allegations in Spycatcher, allegedly based on a copy of the manuscript, appeared in the United Kingdom national daily newspaper The Independent. Later the same day reports of that summary were published in The London Evening Standard and the London Daily News.

On the next day the Attorney General applied to the Queen's Bench Division of the High Court for leave to move against the publishers and editors of these three newspapers for contempt of court that is conduct intended to interfere with or prejudice the administration of justice. Leave was granted on 29 April. In this application (hereinafter referred to as "the Independent case") the Attorney General was not acting - as he was in the breach of confidence proceedings against O.G. - as the representative of the Government, but independently and in his capacity as "the guardian of the public interest in the due administration of justice".

Reports similar to those of 27 April appeared on 29 April in Australia, in The Melbourne Age and the Canberra Times, and on 3 May in the United States of America, in The Washington Post.

23. On 29 April 1987 O.G. applied for the discharge of the Millett injunctions (see paragraph 19 above) on the ground that there had been a significant change of circumstances since they were granted. They referred to what had transpired in the Australian proceedings and to the United Kingdom newspaper reports of 27 April.

The Vice-Chancellor, Sir Nicolas Browne-Wilkinson, began to hear these applications on 7 May but adjourned them pending the determination of a preliminary issue of law, raised in the Independent case (see paragraph 22 above), on which he thought their outcome to be largely dependent, namely "whether a publication made in the knowledge of an outstanding injunction against another party, and which if made by that other party would be in breach thereof, constitutes a criminal contempt of court upon the footing that it assaults or interferes with the process of justice in relation to the said injunction". On 11 May, in response to the Vice-Chancellor's invitation, the Attorney General pursued the proceedings in the Independent case in the Chancery Division of the High Court and the Vice-Chancellor ordered the trial of the preliminary issue.

24. On 14 May 1987 Viking Penguin Incorporated, which had purchased from Mr Wright's Australian publishers the United States

publication rights to *Spycatcher*, announced its intention of publishing the book in the latter country.

25. On 2 June 1987 the Vice-Chancellor decided the preliminary issue of law in the *Independent* case. He held that the reports that had appeared on 27 April 1987 (see paragraph 22 above) could not, as a matter of law, amount to contempt of court because they were not in breach of the express terms of the Millett injunctions and the three newspapers concerned had not been a party to those injunctions or to a breach thereof by the persons they enjoined. The Attorney General appealed.

26. On 15 June 1987 O.G., relying on the intended publication in the United States, applied to have the hearing of their application for discharge of the Millett injunctions restored (see paragraph 23 above). The matter was, however, adjourned pending the outcome of the Attorney General's appeal in the *Independent* case, the hearing of which began on 22 June.

D. Serialisation of *Spycatcher* begins in *The Sunday Times*

27. On 12 July 1987 *The Sunday Times*, which had purchased the British newspaper serialisation rights from Mr Wright's Australian publishers and obtained a copy of the manuscript from Viking Penguin Incorporated in the United States, printed – in its later editions in order to avoid the risk of proceedings for an injunction – the first instalment of extracts from *Spycatcher*. It explained that this was timed to coincide with publication of the book in the United States, which was due to take place on 14 July.

On 13 July the Attorney General commenced proceedings against S.T. for contempt of court, on the ground that the publication frustrated the purpose of the Millett injunctions.

E. Publication of *Spycatcher* in the United States of America

28. On 14 July 1987 Viking Penguin Incorporated published *Spycatcher* in the United States of America; some copies had, in fact, been put on sale on the previous day. It was an immediate best-seller. The British Government, which had been advised that proceedings to restrain publication in the United States would not succeed, took no legal action to that end either in that country or in Canada, where the book also became a best-seller.

29. A substantial number of copies of the book were then brought into the United Kingdom, notably by British citizens who had bought it whilst visiting the United States or who had purchased it by telephone or post from American bookshops. The telephone number and address of such bookshops willing to deliver the book to the United Kingdom were widely advertised in that country. No steps to prevent such imports were taken by the British

Government, which formed the view that although a ban was within their powers, it was likely to be ineffective. They did, however, take steps to prevent the book's being available at United Kingdom booksellers or public libraries.

F. Conclusion of the Independent case

30. On 15 July 1987 the Court of Appeal announced that it would reverse the judgment of the Vice-Chancellor in the Independent case (see paragraph 25 above). Its reasons, which were handed down on 17 July, were basically as follows: the purpose of the Millett injunctions was to preserve the confidentiality of the Spycatcher material until the substantive trial of the actions against O.G.; the conduct of The Independent, The London Evening Standard and the London Daily News could, as a matter of law, constitute a criminal contempt of court because publication of that material would destroy that confidentiality and, hence, the subject-matter of those actions and therefore interfere with the administration of justice. The Court of Appeal remitted the case to the High Court for it to determine whether the three newspapers had acted with the specific intent of so interfering (sections 2(3) and 6(c) of the Contempt of Court Act 1981).

31. The Court of Appeal refused the defendants leave to appeal to the House of Lords and they did not seek leave to appeal from the House itself. Neither did they apply to the High Court for modification of the Millett injunctions. The result of the Court of Appeal's decision was that those injunctions were effectively binding on all the British media, including The Sunday Times.

G. Conclusion of the interlocutory proceedings in the Observer, Guardian and Sunday Times cases; maintenance of the Millett injunctions

32. S.T. made it clear that, unless restrained by law, they would publish the second instalment of the serialisation of Spycatcher on 19 July 1987. On 16 July the Attorney General applied for an injunction to restrain them from publishing further extracts, maintaining that this would constitute a contempt of court by reason of the combined effect of the Millett injunctions and the decision in the Independent case (see paragraph 30 above).

On the same day the Vice-Chancellor granted a temporary injunction restraining publication by S.T. until 21 July 1987. It was agreed that on 20 July he would consider the application by O.G. for discharge of the Millett injunctions (see paragraph 26 above) and that, since they effectively bound S.T. as well, the latter would have a right to be heard in support of that application. It was further agreed that he would also hear the Attorney

General's claim for an injunction against S.T. and that that claim would fail if the Millett injunctions were discharged.

33. Having heard argument from 20 to 22 July 1987, the Vice-Chancellor gave judgment on the last-mentioned date, discharging the Millett injunctions and dismissing the claim for an injunction against S.T.

The Vice-Chancellor's reasons may be briefly summarised as follows.

(a) There had, notably in view of the publication in the United States (see paragraphs 28-29 above), been a radical change of circumstances, and it had to be considered if it would be appropriate to grant the injunctions in the new circumstances.

(b) Having regard to the case-law and notwithstanding the changed circumstances, it had to be assumed that the Attorney General still had an arguable case for obtaining an injunction against O.G. at the substantive trial; accordingly, the ordinary American Cyanamid principles (see paragraph 10 above) fell to be applied.

(c) Since damages would be an ineffective remedy for the Attorney General and would be no compensation to the newspapers, it had to be determined where the balance of convenience lay; the preservation of confidentiality should be favoured unless another public interest outweighed it.

(d) Factors in favour of continuing the injunctions were: the proceedings were only interlocutory; there was nothing new or urgent about Mr Wright's allegations; the injunctions would bind all the media, so that there would be no question of discrimination; undertakings not to publish were still in force in Australia; to discharge the injunctions would mean that the courts were powerless to preserve confidentiality; to continue the injunctions would discourage others from following Mr Wright's example.

(e) Factors in favour of discharging the injunctions were: publication in the United States had destroyed a large part of the purpose of the Attorney General's actions; publications in the press, especially those concerning allegations of unlawful conduct in the public service, should not be restrained unless this was unavoidable; the courts would be brought into disrepute if they made orders manifestly incapable of achieving their purpose.

(f) The matter was quite nicely weighted and in no sense obvious but, with hesitation, the balance fell in favour of discharging the injunctions.

The Attorney General immediately appealed against the Vice-Chancellor's decision; pending the appeal the injunctions against O.G., but not the injunction against S.T. (see paragraph 32 above), were continued in force.

34. In a judgment of 24 July 1987 the Court of Appeal held that:

(a) the Vice-Chancellor had erred in law in various respects, so that the Court of Appeal could exercise its own discretion;

(b) in the light of the American publication of *Spycatcher*, it was inappropriate to continue the Millett injunctions in their original form;

(c) it was, however, appropriate to vary these injunctions to restrain publication in the course of business of all or part of the book or other statements by or attributed to Mr Wright on security matters, but to permit "a summary in very general terms" of his allegations.

The members of the Court of Appeal considered that continuation of the injunctions would: serve to restore confidence in the Security Service by showing that memoirs could not be published without authority (Sir John Donaldson, Master of the Rolls); serve to protect the Attorney General's rights until the trial (Lord Justice Ralph Gibson); or fulfil the courts' duty of deterring the dissemination of material written in breach of confidence (Lord Justice Russell).

The Court of Appeal gave leave to all parties to appeal to the House of Lords.

35. After hearing argument from 27 to 29 July 1987 (when neither side supported the Court of Appeal's compromise solution), the Appellate Committee of the House of Lords gave judgment on 30 July, holding, by a majority of three (Lord Brandon of Oakbrook, Lord Templeman and Lord Ackner) to two (Lord Bridge of Harwich - the immediate past Chairman of the Security Commission - and Lord Oliver of Aylmerton), that the Millett injunctions should continue. In fact, they subsequently remained in force until the commencement of the substantive trial in the breach of confidence actions on 23 November 1987 (see paragraph 39 below).

The majority also decided that the scope of the injunctions should be widened by the deletion of part of the proviso that had previously allowed certain reporting of the Australian proceedings (see paragraph 19 above), since the injunctions would be circumvented if English newspapers were to reproduce passages from *Spycatcher* read out in open court. In the events that happened, this deletion had, according to the Government, no practical incidence on the reporting of the Australian proceedings.

36. The members of the Appellate Committee gave their written reasons on 13 August 1987; they may be briefly summarised as follows.

(a) Lord Brandon of Oakbrook

(i) The object of the Attorney General's actions against O.G. was the protection of an important public interest, namely the maintenance as far as possible of the secrecy of the Security Service; as was recognised in Article 10 para. 2 (art. 10-2) of the Convention, the right to freedom of expression was subject to certain exceptions, including the protection of national security.

(ii) The injunctions in issue were only temporary, being designed to hold the ring until the trial, and their continuation did not prejudice the decision to be made at the trial on the claim for final injunctions.

(iii) The view taken in the courts below, before the American publication, that the Attorney General had a strong arguable case for obtaining final injunctions at the trial was not really open to challenge.

(iv) Publication in the United States had weakened that case, but it remained arguable; it was not clear whether, as a matter of law, that publication had caused the newspapers' duty of non-disclosure to lapse. Although the major part of the potential damage adverted to by Sir Robert Armstrong (see paragraph 16 above) had already been done, the courts might still be able to take useful steps to reduce the risk of similar damage by other Security Service employees in the future. This risk was so serious that the courts should do all they could to minimise it.

(v) The only way to determine the Attorney General's case justly and to strike the proper balance between the public interests involved was to hold a substantive trial at which evidence would be adduced and subjected to cross-examination.

(vi) Immediate discharge of the injunctions would completely destroy the Attorney General's arguable case at the interlocutory stage, without his having had the opportunity of having it tried on appropriate evidence.

(vii) Continuing the injunctions until the trial would, if the Attorney General's claims then failed, merely delay but not prevent the newspapers' right to publish information which, moreover, related to events that had taken place many years in the past.

(viii) In the overall interests of justice, a course which could only result in temporary and in no way irrevocable damage to the cause of the newspapers was to be preferred to one which might result in permanent and irrevocable damage to the cause of the Attorney General.

(b) Lord Templeman (who agreed with the observations of Lords Brandon and Ackner)

(i) The appeal involved a conflict between the right of the public to be protected by the Security Service and its right to be supplied with full information by the press. It therefore involved consideration of the Convention, the question being whether the interference constituted by the injunctions was, on 30 July 1987, necessary in a democratic society for one or more of the purposes listed in Article 10 para. 2 (art. 10-2).

(ii) In terms of the Convention, the restraints were necessary in the interests of national security, for protecting the reputation or rights of others, for preventing the disclosure of information received in confidence and for maintaining the authority of the judiciary. The restraints would prevent harm to the Security Service, notably in the form of the mass circulation, both now and in the future, of accusations to which its members could not respond. To discharge the injunctions would surrender to the press the power to evade a court order designed to protect the confidentiality of information obtained by a member of the Service.

(c) Lord Ackner (who agreed with the observations of Lord Templeman)

(i) It was accepted by all members of the Appellate Committee that: the Attorney General had an arguable case for a permanent injunction; damages were a worthless remedy for the Crown which, if the Millett injunctions were not continued, would lose forever the prospect of obtaining permanent injunctions at the trial; continuation of the Millett injunctions was not a "final locking-out" of the press which, if successful at the trial, would then be able to publish material that had no present urgency; there was a real public interest, that required protection, concerned with the efficient functioning of the Security Service and it extended, as was not challenged by the newspapers, to discouraging the use of the United Kingdom market for the dissemination of unauthorised memoirs of Security Service officers.

(ii) It would thus be a denial of justice to refuse to allow the injunctions to continue until the trial, for that would sweep aside the public-interest factor without any trial and would prematurely and permanently deny the Attorney General any protection from the courts.

(d) Lord Bridge of Harwich

(i) The case in favour of maintaining the Millett injunctions - which had been properly granted in the first place - would not be stronger at the trial than it was now; it would be absurd to continue them temporarily if no case for permanent injunctions could be made out.

(ii) Since the Spycatcher allegations were now freely available to the public, it was manifestly too late for the injunctions to serve the interest of national security in protecting sensitive information.

(iii) It could be assumed that the Attorney General could still assert a bare duty binding on the newspapers, but the question was whether the Millett injunctions could still protect an interest of national security of sufficient weight to justify the resultant encroachment on freedom of speech. The argument that their continuation would have a deterrent effect was of minimal weight.

(iv) The attempt to insulate the British public from information freely available elsewhere was a significant step down the road to censorship characteristic of a totalitarian regime and, if pursued, would lead to the Government's condemnation and humiliation by the European Court of Human Rights.

(e) Lord Oliver of Aylmerton

(i) Mr Justice Millett's initial order was entirely correct.

(ii) The injunctions had originally been imposed to preserve the confidentiality of what were at the time unpublished allegations, but that confidentiality had now been irrevocably destroyed by the publication of Spycatcher. It was questionable whether it was right to use the injunctive remedy against the newspapers (who had not been concerned with that publication) for the remaining purpose which the injunctions might serve, namely punishing Mr Wright and providing an example to others.

(iii) The newspapers had presented their arguments on the footing that the Attorney General still had an arguable case for the grant of permanent injunctions and there was force in the view that the difficult and novel point of law involved should not be determined without further argument at the trial. However, in the light of the public availability of the Spycatcher material, it was difficult to see how it could be successfully argued that the newspapers should be permanently restrained from publishing it and the case of the Attorney General was unlikely to improve in the meantime. No arguable case for permanent injunctions at the trial therefore remained and the Millett injunctions should accordingly be discharged.

H. Conclusion of the Australian proceedings; further publication of Spycatcher

37. On 24 September 1987 the New South Wales Court of Appeal delivered judgment dismissing the Attorney General's appeal (see paragraph 21 above); the majority held that his claim was not justiciable in an Australian court since it involved either an attempt to enforce indirectly the public laws of a foreign State or a determination of the question whether publication would be detrimental to the public interest in the United Kingdom.

The Attorney General appealed to the High Court of Australia. In view of the publication of Spycatcher in the United States and elsewhere, that court declined to grant temporary injunctions restraining its publication in Australia pending the hearing; it was published in that country on 13 October. The appeal was dismissed on 2 June 1988, on the ground that, under international law, a claim - such as the Attorney General's - to enforce British governmental interests in its security service was unenforceable in the Australian courts.

Further proceedings brought by the Attorney General against newspapers for injunctions were successful in Hong Kong but not in New Zealand.

38. In the meantime publication and dissemination of Spycatcher and its contents continued worldwide, not only in the United States (around 715,000 copies were printed and nearly all were sold by October 1987) and in Canada (around 100,000 copies printed), but also in Australia (145,000 copies printed, of which half were sold within a month) and Ireland (30,000 copies printed and distributed). Nearly 100,000 copies were sent to various European countries other than the United Kingdom and copies were distributed from Australia in Asian countries. Radio broadcasts in English about the book were made in Denmark and Sweden and it was translated into twelve other languages, including ten European.

III. THE SUBSTANTIVE PROCEEDINGS IN ENGLAND

A. Breach of confidence

39. On 27 October 1987 the Attorney General instituted proceedings against S.T. for breach of confidence; in addition to injunctive relief, he sought a declaration and an account of profits. The substantive trial of that action and of his actions against O.G. (see paragraph 15 above) - in which, by an amendment of 30 October, he now claimed a declaration as well as an injunction - took place before Mr Justice Scott in the High Court in November-December 1987. He heard evidence on behalf of all parties, the witnesses including Sir Robert Armstrong (see paragraph 16 above). He also continued the interlocutory injunctions, pending delivery of his judgment.

40. Mr Justice Scott gave judgment on 21 December 1987; it contained the following observations and conclusions.

(a) The ground for the Attorney General's claim for permanent injunctions was no longer the preservation of the secrecy of certain information but the promotion of the efficiency and reputation of the Security Service.

(b) Where a duty of confidence is sought to be enforced against a newspaper coming into possession of information known to be confidential, the scope of its duty will depend on the relative weights of the interests claimed to be protected by that duty and the interests served by disclosure.

(c) Account should be taken of Article 10 (art. 10) of the Convention and the judgments of the European Court establishing that a limitation of free expression in the interests of national security should not be regarded as necessary unless there was a "pressing social need" for the limitation and it was "proportionate to the legitimate aims pursued".

(d) Mr Wright owed a duty to the Crown not to disclose any information obtained by him in the course of his employment in MI5. He broke that duty by writing *Spycatcher* and submitting it for publication, and the subsequent publication and dissemination of the book amounted to a further breach, so that the Attorney General would be entitled to an injunction against Mr Wright or any agent of his, restraining publication of *Spycatcher* in the United Kingdom.

(e) O.G. were not in breach of their duty of confidentiality, created by being recipients of Mr Wright's unauthorised disclosures, in publishing their respective articles of 22 and 23 June 1986 (see paragraph 14 above): the articles were a fair report in general terms of the forthcoming trial in Australia and, furthermore, disclosure of two of Mr Wright's allegations was justified on an additional ground relating to the disclosure of "iniquity".

(f) S.T., on the other hand, had been in breach of the duty of confidentiality in publishing the first instalment of extracts from the book on 12 July 1987 (see paragraph 27 above), since those extracts contained certain material which did not raise questions of public interest outweighing those of national security.

(g) S.T. were liable to account for the profits accruing to them as a result of the publication of that instalment.

(h) The Attorney General's claims for permanent injunctions failed because the publication and worldwide dissemination of *Spycatcher* since July 1987 had had the result that there was no longer any duty of confidence lying on newspapers or other third parties in relation to the information in the book; as regards this issue, a weighing of the national security factors relied on against the public interest in freedom of the press showed the latter to be overwhelming.

(i) The Attorney General was not entitled to a general injunction restraining future publication of information derived from Mr Wright or other members of the Security Service.

After hearing argument, Mr Justice Scott imposed fresh temporary injunctions pending an appeal to the Court of Appeal; those injunctions contained a proviso allowing reporting of the Australian proceedings (see paragraphs 19 and 35 above).

41. On appeal by the Attorney General and a cross-appeal by S.T., the Court of Appeal (composed of Sir John Donaldson, Master of the Rolls, Lord Justice Dillon and Lord Justice Bingham) affirmed, on 10 February 1988, the decision of Mr Justice Scott.

However, Sir John Donaldson disagreed with his view that the articles in the *Observer* and *The Guardian* had not constituted a breach of their duty of confidence and that the claim for an injunction against these two newspapers in June 1986 was not "proportionate to the legitimate aim pursued". Lord Justice Bingham, on the other hand, disagreed with Mr Justice Scott's view that S.T. had been in breach of duty by publishing the first instalment of extracts from *Spycatcher*, that they should account for profits and that the Attorney General had been entitled, in the circumstances as they stood in July 1987, to injunctions preventing further serialisation.

After hearing argument, the Court of Appeal likewise granted fresh temporary injunctions pending an appeal to the House of Lords; O.G. and S.T. were given liberty to apply for variation or discharge if any undue delay arose.

42. On 13 October 1988 the Appellate Committee of the House of Lords (Lord Keith of Kinkel, Lord Brightman, Lord Griffiths, Lord Goff of Chieveley and Lord Jauncey of Tullichettle) also affirmed Mr Justice Scott's decision. Dismissing an appeal by the Attorney General and a cross-appeal by S.T., it held:

"(i) That a duty of confidence could arise in contract or in equity and a confidant who acquired information in circumstances importing such a duty should be precluded from disclosing it to others; that a third party in possession of information known to be confidential was bound by a duty of confidence unless the duty was extinguished by the information becoming available to the general public or the duty was outweighed by a countervailing public interest requiring disclosure of the information; that in seeking to restrain the disclosure of government secrets the Crown must demonstrate that disclosure was likely to damage or had damaged the public interest before relief could be granted; that since the world-wide publication of *Spycatcher* had destroyed any secrecy as to its contents, and copies of it were readily available to any individual who wished to obtain them, continuation of the injunctions was not necessary; and that, accordingly, the injunctions should be discharged.

(ii) (Lord Griffiths dissenting) that the articles of 22 and 23 June [1986] had not contained information damaging to the public interest; that the *Observer* and *The Guardian* were not in breach of their duty of confidentiality when they published [those] articles; and that, accordingly, the Crown would not have been entitled to a permanent injunction against both newspapers.

(iii) That *The Sunday Times* was in breach of its duty of confidence in publishing its first serialised extract from *Spycatcher* on 12 July 1987; that it was not protected by either the defence of prior publication or disclosure of iniquity; that imminent publication of the book in the United States did not amount to a justification; and that, accordingly, *The Sunday Times* was liable to account for the profits resulting from that breach.

(iv) That since the information in *Spycatcher* was now in the public domain and no longer confidential no further damage could be done to the public interest that had not already been done; that no injunction should be granted against the *Observer* and *The Guardian* restraining them from reporting on the contents of the book; and that (Lord Griffiths dissenting) no injunction should be granted against *The Sunday Times* to restrain serialising of further extracts from the book.

(v) That members and former members of the Security Service owed a lifelong duty of confidence to the Crown, and that since the vast majority of them would not disclose confidential information to the newspapers it would not be appropriate to grant a general injunction to restrain the newspapers from future publication of any information on the allegations in *Spycatcher* derived from any member or former member of the Security Service."

B. Contempt of court

43. The substantive trial of the Attorney General's actions for contempt of court against *The Independent*, *The London Evening Standard*, the *London Daily News* (see paragraph 22 above), *S.T.* (see paragraph 27 above) and certain other newspapers took place before Mr Justice Morritt in the High Court in April 1989. On 8 May he held, *inter alia*, that *The Independent* and *S.T.* had been in contempt of court and imposed a fine of £50,000 in each case.

44. On 27 February 1990 the Court of Appeal dismissed appeals by the latter two newspapers against the finding that they had been in contempt but concluded that no fines should be imposed. A further appeal by S.T. against the contempt finding was dismissed by the Appellate Committee of the House of Lords on 11 April 1991.

PROCEEDINGS BEFORE THE COMMISSION

45. In their application (no. 13166/87) lodged with the Commission on 31 July 1987, S.T. alleged that the interlocutory injunctions in question constituted an unjustified interference with their freedom of expression, as guaranteed by Article 10 (art. 10) of the Convention. They further claimed that, contrary to Article 13 (art. 13), they had no effective remedy before a national authority for their Article 10 (art. 10) complaint and that they were victims of discrimination in breach of Article 14 (art. 14).

46. The Commission declared the application admissible on 5 October 1989. In its report of 12 July 1990 (Article 31) (art. 31), it expressed the unanimous opinion that there had been a violation of Article 10 (art. 10), but not of Article 13 (art. 13) or Article 14 (art. 14).

The full text of the Commission's opinion and of the concurring opinion contained in the report is reproduced as an annex to this judgment****. On 2 February 1989, S.T. lodged with the Commission a separate application - which is still pending before it - relating to the finding that the publication of the first extract from *Spycatcher* on 12 July 1987 constituted a breach of their duty of confidence (see paragraph 42 (iii) above). They informed the Court at its hearing on 25 June 1991 that they were also making a further application in respect of the finding that they had been in contempt of court (see paragraph 44 above).

FINAL SUBMISSIONS MADE TO THE COURT

47. At the hearing on 25 June 1991, S.T. requested the Court: (a) to find that the continuation of the injunctions on 30 July 1987 was a breach of Article 10 (art. 10); (b) to require the Government to pay to them the costs and expenses they had incurred in England and in Strasbourg; and (c) to

**** Note by the Registrar

For practical reasons this annex will appear only with the printed version of the judgment (volume 217 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

make it clear that the test laid down in *American Cyanamid Co. v. Ethicon Ltd* did not comply with Article 10 (art. 10).

The Government, for their part, invited the Court to make the findings set out in their memorial, namely that there had been no breach of S.T.'s rights under Articles 10, 13 or 14 (art. 10, art. 13, art. 14).

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10) OF THE CONVENTION

A. Introduction

48. S.T alleged that they had been victims of a violation of Article 10 (art. 10) of the Convention, which provides as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

This violation was said to have arisen on account of the interlocutory injunctions which were initially imposed on O.G. and which, as a result of the *Independent* case, were effectively binding on S.T. too, through the doctrine of contempt of court (see paragraphs 17-19 and 30-31 above). The complaint was directed to the restrictions in force during the period from 30 July 1987 to 13 October 1988 and not to the restraints to which S.T. were (see paragraph 32 above) or might have been subject before that.

The allegation was contested by the Government, but accepted unanimously by the Commission.

49. The restrictions complained of clearly constituted, as was not disputed, an "interference" with S.T.'s exercise of their freedom of expression, as guaranteed by paragraph 1 of Article 10 (art. 10-1).

S.T. did not suggest that this interference was not "prescribed by law" or did not have an aim or aims that were legitimate under Article 10 para. 2 (art. 10-2) and the Court perceives no ground for holding otherwise. For the reasons developed in its *Observer and Guardian* judgment of today's date (Series A no. 216, pp. 27- 29, paras. 50-57), it considers that the Millett injunctions were "prescribed by law" and had the primary aim of "maintaining the authority of the judiciary" and the further aim of protecting "national security". To this it would only add that there is no material before it in the present case to suggest that the principles of the law of contempt of court, by the operation whereof the Millett injunctions bound S.T., did not meet the requirements flowing from the expression "prescribed by law". Furthermore, those principles, being designed to prevent conduct intended to interfere with or prejudice the administration of justice (see paragraph 22 above), clearly had the aim of "maintaining the authority of the judiciary".

B. Was the interference "necessary in a democratic society"?

1. General principles

50. Argument before the Court was concentrated on the question whether the interference complained of could be regarded as "necessary in a democratic society". In this connection, the Court's judgments relating to Article 10 (art. 10) – starting with *Handyside* (7 December 1976; Series A no. 24), concluding, most recently, with *Oberschlick* (23 May 1991; Series A no. 204) and including, amongst several others, *Sunday Times* (26 April 1979; Series A no. 30) and *Lingens* (8 July 1986; Series A no. 103) - enounce the following major principles.

(a) Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10 (art. 10), is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.

(b) These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, *inter alia*, in the "interests of national security" or for "maintaining the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".

(c) The adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (art. 10).

(d) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 (art. 10) the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

51. For the avoidance of doubt, and having in mind the written comments that were submitted in this case by "Article 19" (see paragraph 6 above), the Court would only add to the foregoing that Article 10 (art. 10) of the Convention does not in terms prohibit the imposition of prior restraints on publication, as such. This is evidenced not only by the words "conditions", "restrictions", "preventing" and "prevention" which appear in that provision, but also by the Court's *Sunday Times* judgment of 26 April 1979 and its *Markt Intern Verlag GmbH* and *Klaus Beermann* judgment of 20 November 1989 (Series A no. 165). On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.

2. Application in the present case of the foregoing principles

52. S.T. contended that the interference complained of was not "necessary in a democratic society". They relied in particular on the fact that *Spycatcher* had been published in the United States of America on 14 July 1987 (see paragraph 28 above), with the result that the confidentiality of its contents had been destroyed. Furthermore, Mr Wright's memoirs were obtainable from abroad by residents of the United Kingdom, the Government having made no attempt to impose a ban on importation (see paragraph 29 above).

53. In the submission of the Government, the continuation of the interlocutory injunctions during the period from 30 July 1987 to 13 October 1988 nevertheless remained "necessary", in terms of Article 10 (art. 10), for

maintaining the authority of the judiciary and thereby protecting the interests of national security. They relied on the conclusion of the House of Lords in July 1987 that, notwithstanding the United States publication: (a) the Attorney General still had an arguable case for permanent injunctions against S.T., which case could be fairly determined only if restraints on publication were imposed pending the substantive trial; and (b) there was still a national security interest in preventing the general dissemination of the contents of the book through the press and a public interest in discouraging the unauthorised publication of memoirs containing confidential material.

54. The fact that the further publication of Spycatcher material could have been prejudicial to the trial of the Attorney General's claims for permanent injunctions was certainly, in terms of the aim of maintaining the authority of the judiciary, a "relevant" reason for continuing the restraints in question. The Court finds, however, that in the circumstances it does not constitute a "sufficient" reason for the purposes of Article 10 (art. 10).

It is true that the House of Lords had regard to the requirements of the Convention, even though it is not incorporated into domestic law (see paragraph 36 above). It is also true that there is some difference between the casual importation of copies of Spycatcher into the United Kingdom and mass publication of its contents in the press. On the other hand, even if the Attorney General had succeeded in obtaining permanent injunctions at the substantive trial, they would have borne on material the confidentiality of which had been destroyed in any event – and irrespective of whether any further disclosures were made by S.T. – as a result of the publication in the United States. Seen in terms of the protection of the Attorney General's rights as a litigant, the interest in maintaining the confidentiality of that material had, for the purposes of the Convention, ceased to exist by 30 July 1987 (see, *mutatis mutandis*, the Weber judgment of 22 May 1990, Series A no. 177, p. 23, para. 51).

55. As regards the interests of national security relied on, the Court observes that in this respect the Attorney General's case underwent, to adopt the words of Mr Justice Scott, "a curious metamorphosis" (*Attorney General v. Guardian Newspapers Ltd* (no. 2) [1990] 1 Appeal Cases 140F). As emerges from Sir Robert Armstrong's evidence (see paragraph 16 above), injunctions were sought at the outset, *inter alia*, to preserve the secret character of information that ought to be kept secret. By 30 July 1987, however, the information had lost that character and, as was observed by Lord Brandon of Oakbrook (see paragraph 36 (a) (iv) above), the major part of the potential damage adverted to by Sir Robert Armstrong had already been done. By then, the purpose of the injunctions had thus become confined to the promotion of the efficiency and reputation of the Security Service, notably by: preserving confidence in that Service on the part of third parties; making it clear that the unauthorised publication of memoirs

by its former members would not be countenanced; and deterring others who might be tempted to follow in Mr Wright's footsteps.

The Court does not regard these objectives as sufficient to justify the interference complained of. It is, in the first place, open to question whether the actions against S.T. could have served to advance the attainment of these objectives any further than had already been achieved by the steps taken against Mr Wright himself. Again, bearing in mind the availability of an action for an account of profits (see paragraphs 39-42 above), the Court shares the doubts of Lord Oliver of Aylmerton (see paragraph 36 (e)(ii) above) as to whether it was legitimate, for the purpose of punishing Mr Wright and providing an example to others, to use the injunctive remedy against persons, such as S.T., who had not been concerned with the publication of *Spycatcher*. Above all, continuation of the restrictions after July 1987 prevented newspapers from exercising their right and duty to purvey information, already available, on a matter of legitimate public concern.

56. Having regard to the foregoing, the Court concludes that the interference complained of was not "necessary in a democratic society" and that there was accordingly a violation of Article 10 (art. 10).

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, TAKEN IN CONJUNCTION WITH ARTICLE 10 (art. 14+10)

57. S.T. complained that, unlike themselves, publishers in the United States of America and elsewhere outside the United Kingdom were free to impart the information and ideas contained in *Spycatcher* to their readers. They alleged that on this account they had been victims of a violation of Article 14 of the Convention, taken in conjunction with Article 10 (art. 14+10), the former provision (art. 14) reading as follows:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

58. The Court agrees with the Government and the Commission that this complaint has to be rejected.

Article 14 (art. 14) affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations (see, for example, the *Fredin* judgment of 18 February 1991, Series A no. 192, p. 19, para. 60). If and in so far as foreign publishers were not subject to the same restrictions as S.T., this was because they were not subject to the jurisdiction of the English courts and hence were not in a situation similar to that of S.T.

59. There was thus no violation of Article 14 taken in conjunction with Article 10 (art. 14+10).

III. ALLEGED VIOLATION OF ARTICLE 13 (art. 13) OF THE CONVENTION

60. S.T. asserted that they had no effective remedy in England for their complaints: Articles 10 and 14 (art. 10, art. 14) of the Convention and their standards were not incorporated into English law and there were no equivalent domestic provisions, the standards laid down in *American Cyanamid Co. v. Ethicon Ltd* (see paragraph 10 above) being less strict. They alleged that on this account they had been victims of a violation of Article 13 (art. 13) of the Convention, which provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

61. The Court agrees with the Government and the Commission that this allegation has to be rejected.

The thrust of S.T.'s complaint under the Convention was that the imposition of interlocutory injunctions constituted an unjustified interference with their freedom of expression and it is clear that they not only could but also did raise this issue in substance before the domestic courts. And it has to be recalled that the effectiveness of a remedy, for the purposes of Article 13 (art. 13), does not depend on the certainty of a favourable outcome (see the *Soering* judgment of 7 July 1989, Series A no. 161, p. 48, para. 122).

As regards the specific matters pleaded, the Court has held on several occasions that there is no obligation to incorporate the Convention into domestic law (see, for example, the *James and Others* judgment of 21 February 1986, Series A no. 98, p. 47, para. 84). Again, Article 13 (art. 13) does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention (see the same judgment, p. 47, para. 85).

62. There has accordingly been no violation of Article 13 (art. 13).

IV. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

63. Under Article 50 (art. 50) of the Convention,

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

S.T. made no claim for compensation for damage, but they did seek under this provision reimbursement of their legal costs and expenses in the domestic and the Strasbourg proceedings, in a total amount of £224,340.67.

The Court has examined this issue in the light of the criteria established in its case-law and of the observations submitted by the Government and the applicants.

A. The domestic proceedings

64. The breakdown of the claim, totalling £84,219.80, in respect of costs and expenses referable to the domestic proceedings (the hearings in 1987 before the Vice-Chancellor, the Court of Appeal and the House of Lords; see paragraphs 32-36 above) is as follows:

- (a) profit costs of the applicants' solicitors: £36,143.50;
- (b) solicitors' disbursements: £9,507.53;
- (c) counsel's fees: £30,590.00;
- (d) costs and interest paid by the applicants to the Attorney General: £7,978.77.

65. The Court's observations on this claim are as follows.

(a) It agrees with the Government that the costs charged by the solicitors cannot be regarded as "reasonable as to quantum" for the purposes of Article 50 (art. 50).

(b) Whilst it is not in a position to enter into the detailed calculations involved, it shares the Government's doubts as to whether all the disbursements can be considered to have been "necessarily" incurred. The figure to be allowed for this item should accordingly be reduced.

(c) It also considers that the total fees claimed for counsel exceed what can be regarded as reasonable as between the parties.

66. Having regard to the foregoing, the Court awards to the applicants, in respect of their costs and the amount paid to the Attorney General, the sum of £50,000.

B. The Strasbourg proceedings

67. The breakdown of the claim, totalling £140,120.87, in respect of costs and expenses referable to the proceedings before the Convention institutions is as follows:

- (a) profit costs of the applicants' solicitors: £82,779.30;
- (b) solicitors' disbursements: £16,791.57;
- (c) counsel's fees: £40,550.00.

68. The Court's observations on this claim are as follows.

(a) The Government submitted that a reduction should be made if no breach of Articles 13 and 14 (art. 13, art. 14) were found. However, it would not be appropriate to make a significant reduction on this account, since the bulk of the work done by the applicants' advisers related to Article 10 (art. 10) (see, *mutatis mutandis*, the Granger judgment of 28 March 1990, Series A no. 174, p. 21, para. 55).

(b) The remarks in paragraph 65 above concerning the solicitors' charges, the disbursements and counsel's fees also apply to the Strasbourg proceedings.

69. Having regard to the foregoing, the Court awards the sum of £50,000.

C. Conclusion

70. The total amount to be paid to the applicants is accordingly £100,000. This figure is to be increased by any value-added tax that may be chargeable.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of Article 10 (art. 10) of the Convention;
2. Holds that there has been no violation of Article 13 (art. 13) or of Article 14 taken in conjunction with Article 10 (art. 14+10);
3. Holds that the United Kingdom is to pay, within three months, to the applicants jointly the sum of £100,000 (one hundred thousand pounds), together with any value-added tax that may be chargeable, for costs and expenses;
4. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 November 1991.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) separate opinion of Mr De Meyer (concerning prior restraint), joined by Mr Pettiti, Mr Russo, Mr Foighel and Mr Bigi;

(b) separate opinion of Mr De Meyer (concerning domestic remedies),
joined by Mr Pettiti;

(c) separate opinion of Mr Valticos.

R.R.
M.-A.E.

SEPARATE OPINION OF JUDGE DE MEYER (concerning
prior restraint), JOINED BY JUDGES PETTITI, RUSSO,
FOIGHEL AND BIGI

I concur in the result, but I cannot agree with the Court's reasoning on the subject of prior restraint: my reasons are those stated in my opinion concerning the Observer and Guardian case^{*}.

^{*} Series A no. 216, p. 46.

SEPARATE OPINION OF JUDGE DE MEYER (concerning
domestic remedies), JOINED BY JUDGE PETTITI

For the reasons stated in my separate opinion concerning the Observer and Guardian case*, I cannot subscribe to the third sub-paragraph of paragraph 61 of the present judgment.

* Series A no. 216, p. 47.

SEPARATE OPINION OF JUDGE VALTICOS

(Translation)

The observations contained in my separate opinion in the Observer and Guardian case* apply equally to paragraph 61 of the present judgment.

* Series A no. 216, p. 48.



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (PLENARY)

**CASE OF OBSERVER AND GUARDIAN v. THE UNITED
KINGDOM**

(Application no. 13585/88)

JUDGMENT

STRASBOURG

26 November 1991

In the case of the Observer and Guardian v. the United Kingdom*,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 51 of the Rules of Court** and composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr J. CREMONA,
Mr Thór VILHJÁLMSSON,
Mrs D. BINDSCHEDLER-ROBERT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr J. PINHEIRO FARINHA,
Mr L.-E. PETTITI,
Mr B. WALSH,
Sir Vincent EVANS,
Mr R. MACDONALD,
Mr C. RUSSO,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr S. K. MARTENS,
Mrs E. PALM,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr J. M. MORENILLA,
Mr F. BIGI,
Mr A. BAKA,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 28 June and 24 October 1991,

Delivers the following judgment, which was adopted on the last-mentioned date:

* The case is numbered 51/1990/242/313. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** The amended Rules of Court which entered into force on 1 April 1989 are applicable to the present case.

PROCEDURE

1. The case was referred to the Court on 12 October 1990 by the European Commission of Human Rights ("the Commission") and on 23 November 1990 by the Government of the United Kingdom of Great Britain and Northern Ireland ("the Government"), within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 13585/88) against the United Kingdom lodged with the Commission under Article 25 (art. 25) on 27 January 1988 by two companies incorporated in England, The Observer Ltd and Guardian Newspapers Ltd, and five British citizens, Mr Donald Trelford, Mr David Leigh, Mr Paul Lashmar, Mr Peter Preston and Mr Richard Norton-Taylor.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46) and the Government's application, to Article 48 (art. 48). The object of the request and the application was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10) and also, in the case of the request, Articles 13 and 14 (art. 13, art. 14) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30).

3. On 15 October 1990 the President of the Court decided, under Rule 21 para. 6 and in the interest of the proper administration of justice, that a single Chamber should be constituted to consider both the instant case and the Sunday Times (no. 2) case*.

The Chamber thus constituted included ex officio Sir Vincent Evans, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 26 October 1990 the President drew by lot, in the presence of the Registrar, the names of the seven other members, namely Mr J. Cremona, Mrs D. Bindschedler-Robert, Mr F. Matscher, Mr R. Macdonald, Mr C. Russo, Mr R. Bernhardt and Mr R. Pekkanen (Article 43 in fine of the Convention** and Rule 21 para. 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Registrar, consulted the Agent of the Government,

* Case no. 50/1990/241/312.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

the Delegate of the Commission and the representatives of the applicants on the need for a written procedure (Rule 37 para. 1) and the date of the opening of the oral proceedings (Rule 38).

In accordance with the President's orders and directions, the registry received, on 15 April 1991, the applicants' memorial and, on 18 April, the Government's. By letter of 31 May 1991, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 21 March 1991 the Chamber decided, pursuant to Rule 51, to relinquish jurisdiction forthwith in favour of the plenary Court.

6. On 25 March 1991 the President granted, under Rule 37 para. 2, leave to "Article 19" (the International Centre against Censorship) to submit written comments on a specific issue arising in the case. He directed that the comments should be filed by 15 May 1991; they were, in fact, received on that date.

7. As directed by the President, the hearing, devoted to the present and the Sunday Times (no.2) cases, took place in public in the Human Rights Building, Strasbourg, on 25 June 1991. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mrs A. GLOVER, Legal Counsellor,

Foreign and Commonwealth Office,

Agent,

Mr N. BRATZA, Q.C.,

Mr P. HAVERS, Barrister-at-Law,

Counsel,

Mrs S. EVANS, Home Office,

Mr D. BRUMMELL, Treasury Solicitor,

Advisers;

- for the Commission

Mr E. BUSUTTIL,

Delegate;

- for the applicants in the present case

Mr D. BROWNE, Q.C.,

Counsel,

Mrs J. MCDERMOTT, Solicitor;

- for the applicants in the Sunday Times (no. 2) case

Mr A. LESTER, Q.C.,

Mr D. PANNICK, Barrister-at-Law,

Counsel,

Mr M. KRAMER,

Ms K. RIMELL, Solicitors,

Mr A. WHITAKER, Legal Manager,

Times Newspapers Ltd,

Adviser.

The Court heard addresses by Mr Bratza for the Government, by Mr Busuttil for the Commission and by Mr Browne and Mr Lester for the applicants, as well as replies to questions put by the President of the Court.

8. The applicants filed a number of documents on the occasion of the hearing.

On 23 July, 5 August and 2 September 1991, respectively, the registry received supplementary particulars of the applicants' claim under Article 50 (art. 50) of the Convention, the observations of the Government on that claim and the applicants' reply to those observations. By letter of 17 September, the Deputy Secretary to the Commission informed the Registrar that the Delegate left this matter to the Court's discretion.

AS TO THE FACTS

I. INTRODUCTION

A. The applicants

9. The applicants in this case (who are hereinafter together referred to as "O.G.") are (a) The Observer Ltd, the proprietors and publishers of the United Kingdom national Sunday newspaper Observer, Mr Donald Trelford, its editor, and Mr David Leigh and Mr Paul Lashmar, two of its reporters; and (b) Guardian Newspapers Ltd, the proprietors and publishers of the United Kingdom national daily newspaper The Guardian, Mr Peter Preston, its editor, and Mr Richard Norton-Taylor, one of its reporters. They complain of interlocutory injunctions imposed by the English courts on the publication of details of the book *Spycatcher* and information obtained from its author, Mr Peter Wright.

B. Interlocutory injunctions

10. In litigation where the plaintiff seeks a permanent injunction against the defendant, the English courts have a discretion to grant the plaintiff an "interlocutory injunction" (a temporary restriction pending the determination of the dispute at the substantive trial) which is designed to protect his position in the interim. In that event the plaintiff will normally be required to give an undertaking to pay damages to the defendant should the latter succeed at the trial.

The principles on which such injunctions will be granted - to which reference was made in the proceedings in the present case - were set out in *American Cyanamid Co. v. Ethicon Ltd* ([1975] Appeal Cases 396) and may be summarised as follows.

(a) It is not for the court at the interlocutory stage to seek to determine disputed issues of fact or to decide difficult questions of law which call for detailed argument and mature consideration.

(b) Unless the material before the court at that stage fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction, the court should consider, in the light of the particular circumstances of the case, whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

(c) If damages would be an adequate remedy for the plaintiff if he were to succeed at the trial, no interlocutory injunction should normally be granted. If, on the other hand, damages would not provide an adequate remedy for the plaintiff but would adequately compensate the defendant under the plaintiff's undertaking if the defendant were to succeed at the trial, there would be no reason to refuse an interlocutory injunction on this ground.

(d) It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience arises.

(e) Where other factors appear evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo.

C. Spycatcher

11. Mr Peter Wright was employed by the British Government as a senior member of the British Security Service (MI5) from 1955 to 1976, when he resigned. Subsequently, without any authority from his former employers, he wrote his memoirs, entitled *Spycatcher*, and made arrangements for their publication in Australia, where he was then living. The book dealt with the operational organisation, methods and personnel of MI5 and also included an account of alleged illegal activities by the Security Service. He asserted therein, inter alia, that MI5 conducted unlawful activities calculated to undermine the 1974-1979 Labour Government, burgled and "bugged" the embassies of allied and hostile countries and planned and participated in other unlawful and covert activities at home and abroad, and that Sir Roger Hollis, who led MI5 during the latter part of Mr Wright's employment, was a Soviet agent.

Mr Wright had previously sought, unsuccessfully, to persuade the British Government to institute an independent inquiry into these allegations. In 1987 such an inquiry was also sought by, amongst others, a number of prominent members of the 1974-1979 Labour Government, but in vain.

12. Part of the material in *Spycatcher* had already been published in a number of books about the Security Service written by Mr Chapman Pincher. Moreover, in July 1984 Mr Wright had given a lengthy interview to Granada Television (an independent television company operating in the United Kingdom) about the work of the service and the programme was shown again in December 1986. Other books and another television programme on the workings and secrets of the service were produced at

about the same time, but little Government action was taken against the authors or the media.

D. Institution of proceedings in Australia

13. In September 1985 the Attorney General of England and Wales ("the Attorney General") instituted, on behalf of the United Kingdom Government, proceedings in the Equity Division of the Supreme Court of New South Wales, Australia, to restrain publication of *Spycatcher* and of any information therein derived from Mr Wright's work for the Security Service. The claim was based not on official secrecy but on the ground that the disclosure of such information by Mr Wright would constitute a breach of, notably, his duty of confidentiality under the terms of his employment. On 17 September he and his publishers, Heinemann Publishers Australia Pty Ltd, gave undertakings, by which they abided, not to publish pending the hearing of the Government's claim for an injunction.

Throughout the Australian proceedings the Government objected to the book as such; they declined to indicate which passages they objected to as being detrimental to national security.

II. THE INTERLOCUTORY PROCEEDINGS IN ENGLAND AND EVENTS OCCURRING WHILST THEY WERE IN PROGRESS

A. The Observer and Guardian articles and the ensuing injunctions

14. Whilst the Australian proceedings were still pending, there appeared, on Sunday 22 and Monday 23 June 1986 respectively, short articles on inside pages of the Observer and The Guardian reporting on the forthcoming hearing in Australia and giving details of some of the contents of the manuscript of *Spycatcher*. These two newspapers had for some time been conducting a campaign for an independent investigation into the workings of the Security Service. The details given included the following allegations of improper, criminal and unconstitutional conduct on the part of MI5 officers:

(a) MI5 "bugged" all diplomatic conferences at Lancaster House in London throughout the 1950's and 1960's, as well as the Zimbabwe independence negotiations in 1979;

(b) MI5 "bugged" diplomats from France, Germany, Greece and Indonesia, as well as Mr Krushchev's hotel suite during his visit to Britain in the 1950's, and was guilty of routine burglary and "bugging" (including the entering of Soviet consulates abroad);

(c) MI5 plotted unsuccessfully to assassinate President Nasser of Egypt at the time of the Suez crisis;

(d) MI5 plotted against Harold Wilson during his premiership from 1974 to 1976;

(e) MI5 (contrary to its guidelines) diverted its resources to investigate left-wing political groups in Britain.

The Observer and Guardian articles, which were written by Mr Leigh and Mr Lashmar and by Mr Norton-Taylor respectively, were based on investigations by these journalists from confidential sources and not on generally available international press releases or similar material. However, much of the actual information in the articles had already been published elsewhere (see paragraph 12 above). The English courts subsequently inferred that, on the balance of probabilities, the journalists' sources must have come from the offices of the publishers of Spycatcher or the solicitors acting for them and the author (see the judgment of 21 December 1987 of Mr Justice Scott; paragraph 40 below).

15. The Attorney General instituted proceedings for breach of confidence in the Chancery Division of the High Court of Justice of England and Wales against O.G., seeking permanent injunctions restraining them from making any publication of Spycatcher material. He based his claim on the principle that the information in the memoirs was confidential and that a third party coming into possession of information knowing that it originated from a breach of confidence owed the same duty to the original confider as that owed by the original confidant. It was accepted that an award of damages would have been an insufficient and inappropriate remedy for the Attorney General and that only an injunction would serve his purpose.

16. The evidential basis for the Attorney General's claim was two affidavits sworn by Sir Robert Armstrong, Secretary to the British Cabinet, in the Australian proceedings on 9 and 27 September 1985. He had stated therein, *inter alia*, that the publication of any narrative based on information available to Mr Wright as a member of the Security Service would cause unquantifiable damage, both to the service itself and to its officers and other persons identified, by reason of the disclosures involved. It would also undermine the confidence that friendly countries and other organisations and persons had in the Security Service and create a risk of other employees or former employees of that service seeking to publish similar information.

17. On 27 June 1986 *ex parte* interim injunctions were granted to the Attorney General restraining any further publication of the kind in question pending the substantive trial of the actions. On an application by O.G. and after an *inter partes* hearing on 11 July, Mr Justice Millett (sitting in the Chancery Division) decided that these injunctions should remain in force, but with various modifications. The defendants were given liberty to apply to vary or discharge the orders on giving twenty-four hours' notice.

18. The reasons for Mr Justice Millett's decision may be briefly summarised as follows.

(a) Disclosure by Mr Wright of information acquired as a member of the Security Service would constitute a breach of his duty of confidentiality.

(b) O.G. wished to be free to publish further information deriving directly or indirectly from Mr Wright and disclosing alleged unlawful activity on the part of the Security Service, whether or not it had been previously published.

(c) Neither the right to freedom of speech nor the right to prevent the disclosure of information received in confidence was absolute.

(d) In resolving, as in the present case, a conflict between the public interest in preventing and the public interest in allowing such disclosure, the court had to take into account all relevant considerations, including the facts that this was an interlocutory application and not the trial of the action, that the injunctions sought at this stage were only temporary and that the refusal of injunctive relief might cause irreparable harm and effectively deprive the Attorney General of his rights. In such circumstances, the conflict should be resolved in favour of restraint, unless the court was satisfied that there was a serious defence of public interest that might succeed at the trial: an example would be when the proposed publication related to unlawful acts, the disclosure of which was required in the public interest. This could be regarded either as an exception to the American Cyanamid principles (see paragraph 10 above) or their application in special circumstances where the public interest was invoked on both sides.

(e) The Attorney General's principal objection was not to the dissemination of allegations about the Security Service but to the fact that those allegations were made by one of its former employees, it being that particular fact which O.G. wished to publish. There was credible evidence (in the shape of Sir Robert Armstrong's affidavits; see paragraph 16 above) that the appearance of confidentiality was essential to the operation of the Security Service and that the efficient discharge of its duties would be impaired, with consequent danger to national security, if senior officers were known to be free to disclose what they had learned whilst employed by it. Although this evidence remained to be tested at the substantive trial, the refusal of an interlocutory injunction would permit indirect publication and permanently deprive the Attorney General of his rights at the trial. Bearing in mind, *inter alia*, that the alleged unlawful activities had occurred some time in the past, there was, moreover, no compelling interest requiring publication immediately rather than after the trial.

In the subsequent stages of the interlocutory proceedings, both the Court of Appeal (see paragraphs 19 and 34 below) and all the members of the Appellate Committee of the House of Lords (see paragraphs 35-36 below) considered that this initial grant of interim injunctions by Mr Justice Millett was justified.

19. On 25 July 1986 the Court of Appeal dismissed an appeal by O.G. and upheld the injunctions, with minor modifications. It referred to the

American Cyanamid principles (see paragraph 10 above) and considered that Mr Justice Millett had not misdirected himself or exercised his discretion on an erroneous basis. It refused leave to appeal to the House of Lords. It also certified the case as fit for a speedy trial.

As amended by the Court of Appeal, the injunctions ("the Millett injunctions") restrained O.G., until the trial of the action or further order, from:

"1. disclosing or publishing or causing or permitting to be disclosed or published to any person any information obtained by Peter Maurice Wright in his capacity as a member of the British Security Service and which they know, or have reasonable grounds to believe, to have come or been obtained, whether directly or indirectly, from the said Peter Maurice Wright;

2. attributing in any disclosure or publication made by them to any person any information concerning the British Security Service to the said Peter Maurice Wright whether by name or otherwise."

The orders contained the following provisos:

"1. this Order shall not prohibit direct quotation of attributions to Peter Maurice Wright already made by Mr Chapman Pincher in published works, or in a television programme or programmes broadcast by Granada Television;

2. no breach of this Order shall be constituted by the disclosure or publication of any material disclosed in open court in the Supreme Court of New South Wales unless prohibited by the Judge there sitting or which, after the trial there in action no. 4382 of 1985, is not prohibited from publication;

3. no breach of this Order shall be constituted by a fair and accurate report of proceedings in (a) either House of Parliament in the United Kingdom whose publication is permitted by that House; or (b) a court of the United Kingdom sitting in public."

20. On 6 November 1986 the Appellate Committee of the House of Lords granted leave to appeal against the Court of Appeal's decision. The appeal was subsequently withdrawn in the light of the House of Lords decision of 30 July 1987 (see paragraphs 35-36 below).

B. The first-instance decision in Australia

21. The trial of the Government's action in Australia (see paragraph 13 above) took place in November and December 1986. The proceedings were reported in detail in the media in the United Kingdom and elsewhere. In a judgment delivered on 13 March 1987 Mr Justice Powell rejected the Attorney General's claim against Mr Wright and his publishers, holding that much of the information in *Spycatcher* was no longer confidential and that publication of the remainder would not be detrimental to the British Government or the Security Service. The undertakings not to publish were then discharged by order of the court.

The Attorney General lodged an appeal; after a hearing in the New South Wales Court of Appeal in the week of 27 July 1987, judgment was reserved. The defendants had given further undertakings not to publish whilst the appeal was pending.

C. Further press reports concerning Spycatcher; the Independent case

22. On 27 April 1987 a major summary of certain of the allegations in Spycatcher, allegedly based on a copy of the manuscript, appeared in the United Kingdom national daily newspaper The Independent. Later the same day reports of that summary were published in The London Evening Standard and the London Daily News.

On the next day the Attorney General applied to the Queen's Bench Division of the High Court for leave to move against the publishers and editors of these three newspapers for contempt of court, that is conduct intended to interfere with or prejudice the administration of justice. Leave was granted on 29 April. In this application (hereinafter referred to as "the Independent case") the Attorney General was not acting - as he was in the breach of confidence proceedings against O.G. - as the representative of the Government, but independently and in his capacity as "the guardian of the public interest in the due administration of justice".

Reports similar to those of 27 April appeared on 29 April in Australia, in The Melbourne Age and the Canberra Times, and on 3 May in the United States of America, in The Washington Post.

23. On 29 April 1987 O.G. applied for the discharge of the Millett injunctions (see paragraph 19 above) on the ground that there had been a significant change of circumstances since they were granted. They referred to what had transpired in the Australian proceedings and to the United Kingdom newspaper reports of 27 April.

The Vice-Chancellor, Sir Nicolas Browne-Wilkinson, began to hear these applications on 7 May but adjourned them pending the determination of a preliminary issue of law, raised in the Independent case (see paragraph 22 above), on which he thought their outcome to be largely dependent, namely "whether a publication made in the knowledge of an outstanding injunction against another party, and which if made by that other party would be in breach thereof, constitutes a criminal contempt of court upon the footing that it assaults or interferes with the process of justice in relation to the said injunction". On 11 May, in response to the Vice-Chancellor's invitation, the Attorney General pursued the proceedings in the Independent case in the Chancery Division of the High Court and the Vice-Chancellor ordered the trial of the preliminary issue.

24. On 14 May 1987 Viking Penguin Incorporated, which had purchased from Mr Wright's Australian publishers the United States publication rights

to Spycatcher, announced its intention of publishing the book in the latter country.

25. On 2 June 1987 the Vice-Chancellor decided the preliminary issue of law in the Independent case. He held that the reports that had appeared on 27 April 1987 (see paragraph 22 above) could not, as a matter of law, amount to contempt of court because they were not in breach of the express terms of the Millett injunctions and the three newspapers concerned had not been a party to those injunctions or to a breach thereof by the persons they enjoined. The Attorney General appealed.

26. On 15 June 1987 O.G., relying on the intended publication in the United States, applied to have the hearing of their application for discharge of the Millett injunctions restored (see paragraph 23 above). The matter was, however, adjourned pending the outcome of the Attorney General's appeal in the Independent case, the hearing of which began on 22 June.

D. Serialisation of Spycatcher begins in The Sunday Times

27. On 12 July 1987 the United Kingdom national Sunday newspaper The Sunday Times, which had purchased the British newspaper serialisation rights from Mr Wright's Australian publishers and obtained a copy of the manuscript from Viking Penguin Incorporated in the United States, printed - in its later editions in order to avoid the risk of proceedings for an injunction - the first instalment of extracts from Spycatcher. It explained that this was timed to coincide with publication of the book in the United States, which was due to take place on 14 July.

On 13 July the Attorney General commenced proceedings for contempt of court against Times Newspapers Ltd, the publisher of The Sunday Times, and Mr Andrew Neil, its editor (hereinafter together referred to as "S.T."), on the ground that the publication frustrated the purpose of the Millett injunctions.

E. Publication of Spycatcher in the United States of America

28. On 14 July 1987 Viking Penguin Incorporated published Spycatcher in the United States of America; some copies had, in fact, been put on sale on the previous day. It was an immediate best-seller. The British Government, which had been advised that proceedings to restrain publication in the United States would not succeed, took no legal action to that end either in that country or in Canada, where the book also became a best-seller.

29. A substantial number of copies of the book were then brought into the United Kingdom, notably by British citizens who had bought it whilst visiting the United States or who had purchased it by telephone or post from American bookshops. The telephone number and address of such bookshops

willing to deliver the book to the United Kingdom were widely advertised in that country. No steps to prevent such imports were taken by the British Government, which formed the view that although a ban was within their powers, it was likely to be ineffective. They did, however, take steps to prevent the book's being available at United Kingdom booksellers or public libraries.

F. Conclusion of the Independent case

30. On 15 July 1987 the Court of Appeal announced that it would reverse the judgment of the Vice-Chancellor in the Independent case (see paragraph 25 above). Its reasons, which were handed down on 17 July, were basically as follows: the purpose of the Millett injunctions was to preserve the confidentiality of the Spycatcher material until the substantive trial of the actions against O.G.; the conduct of The Independent, The London Evening Standard and the London Daily News could, as a matter of law, constitute a criminal contempt of court because publication of that material would destroy that confidentiality and, hence, the subject-matter of those actions and therefore interfere with the administration of justice. The Court of Appeal remitted the case to the High Court for it to determine whether the three newspapers had acted with the specific intent of so interfering (sections 2(3) and 6(c) of the Contempt of Court Act 1981).

31. The Court of Appeal refused the defendants leave to appeal to the House of Lords and they did not seek leave to appeal from the House itself. Neither did they apply to the High Court for modification of the Millett injunctions. The result of the Court of Appeal's decision was that those injunctions were effectively binding on all the British media, including The Sunday Times.

G. Conclusion of the interlocutory proceedings in the Observer, Guardian and Sunday Times cases; maintenance of the Millett injunctions

32. S.T. made it clear that, unless restrained by law, they would publish the second instalment of the serialisation of Spycatcher on 19 July 1987. On 16 July the Attorney General applied for an injunction to restrain them from publishing further extracts, maintaining that this would constitute a contempt of court by reason of the combined effect of the Millett injunctions and the decision in the Independent case (see paragraph 30 above).

On the same day the Vice-Chancellor granted a temporary injunction restraining publication by S.T. until 21 July 1987. It was agreed that on 20 July he would consider the application by O.G. for discharge of the Millett injunctions (see paragraph 26 above) and that, since they effectively bound

S.T. as well, the latter would have a right to be heard in support of that application. It was further agreed that he would also hear the Attorney General's claim for an injunction against S.T. and that that claim would fail if the Millett injunctions were discharged.

33. Having heard argument from 20 to 22 July 1987, the Vice-Chancellor gave judgment on the last-mentioned date, discharging the Millett injunctions and dismissing the claim for an injunction against S.T.

The Vice-Chancellor's reasons may be briefly summarised as follows.

(a) There had, notably in view of the publication in the United States (see paragraphs 28-29 above), been a radical change of circumstances, and it had to be considered if it would be appropriate to grant the injunctions in the new circumstances.

(b) Having regard to the case-law and notwithstanding the changed circumstances, it had to be assumed that the Attorney General still had an arguable case for obtaining an injunction against O.G. at the substantive trial; accordingly, the ordinary American Cyanamid principles (see paragraph 10 above) fell to be applied.

(c) Since damages would be an ineffective remedy for the Attorney General and would be no compensation to the newspapers, it had to be determined where the balance of convenience lay; the preservation of confidentiality should be favoured unless another public interest outweighed it.

(d) Factors in favour of continuing the injunctions were: the proceedings were only interlocutory; there was nothing new or urgent about Mr Wright's allegations; the injunctions would bind all the media, so that there would be no question of discrimination; undertakings not to publish were still in force in Australia; to discharge the injunctions would mean that the courts were powerless to preserve confidentiality; to continue the injunctions would discourage others from following Mr Wright's example.

(e) Factors in favour of discharging the injunctions were: publication in the United States had destroyed a large part of the purpose of the Attorney General's actions; publications in the press, especially those concerning allegations of unlawful conduct in the public service, should not be restrained unless this was unavoidable; the courts would be brought into disrepute if they made orders manifestly incapable of achieving their purpose.

(f) The matter was quite nicely weighted and in no sense obvious but, with hesitation, the balance fell in favour of discharging the injunctions.

The Attorney General immediately appealed against the Vice-Chancellor's decision; pending the appeal the injunctions against O.G., but not the injunction against S.T. (see paragraph 32 above), were continued in force.

34. In a judgment of 24 July 1987 the Court of Appeal held that:

(a) the Vice-Chancellor had erred in law in various respects, so that the Court of Appeal could exercise its own discretion;

(b) in the light of the American publication of *Spycatcher*, it was inappropriate to continue the Millett injunctions in their original form;

(c) it was, however, appropriate to vary these injunctions to restrain publication in the course of business of all or part of the book or other statements by or attributed to Mr Wright on security matters, but to permit "a summary in very general terms" of his allegations.

The members of the Court of Appeal considered that continuation of the injunctions would: serve to restore confidence in the Security Service by showing that memoirs could not be published without authority (Sir John Donaldson, Master of the Rolls); serve to protect the Attorney General's rights until the trial (Lord Justice Ralph Gibson); or fulfil the courts' duty of deterring the dissemination of material written in breach of confidence (Lord Justice Russell).

The Court of Appeal gave leave to all parties to appeal to the House of Lords.

35. After hearing argument from 27 to 29 July 1987 (when neither side supported the Court of Appeal's compromise solution), the Appellate Committee of the House of Lords gave judgment on 30 July, holding, by a majority of three (Lord Brandon of Oakbrook, Lord Templeman and Lord Ackner) to two (Lord Bridge of Harwich - the immediate past Chairman of the Security Commission - and Lord Oliver of Aylmerton), that the Millett injunctions should continue. In fact, they subsequently remained in force until the commencement of the substantive trial in the breach of confidence actions on 23 November 1987 (see paragraph 39 below).

The majority also decided that the scope of the injunctions should be widened by the deletion of part of the proviso that had previously allowed certain reporting of the Australian proceedings (see paragraph 19 above), since the injunctions would be circumvented if English newspapers were to reproduce passages from *Spycatcher* read out in open court. In the events that happened, this deletion had, according to the Government, no practical incidence on the reporting of the Australian proceedings.

36. The members of the Appellate Committee gave their written reasons on 13 August 1987; they may be briefly summarised as follows.

(a) Lord Brandon of Oakbrook

(i) The object of the Attorney General's actions against O.G. was the protection of an important public interest, namely the maintenance as far as possible of the secrecy of the Security Service; as was recognised in Article 10 para. 2 (art. 10-2) of the Convention, the right to freedom of expression was subject to certain exceptions, including the protection of national security.

(ii) The injunctions in issue were only temporary, being designed to hold the ring until the trial, and their continuation did not prejudice the decision to be made at the trial on the claim for final injunctions.

(iii) The view taken in the courts below, before the American publication, that the Attorney General had a strong arguable case for obtaining final injunctions at the trial was not really open to challenge.

(iv) Publication in the United States had weakened that case, but it remained arguable; it was not clear whether, as a matter of law, that publication had caused the newspapers' duty of non-disclosure to lapse. Although the major part of the potential damage adverted to by Sir Robert Armstrong (see paragraph 16 above) had already been done, the courts might still be able to take useful steps to reduce the risk of similar damage by other Security Service employees in the future. This risk was so serious that the courts should do all they could to minimise it.

(v) The only way to determine the Attorney General's case justly and to strike the proper balance between the public interests involved was to hold a substantive trial at which evidence would be adduced and subjected to cross-examination.

(vi) Immediate discharge of the injunctions would completely destroy the Attorney General's arguable case at the interlocutory stage, without his having had the opportunity of having it tried on appropriate evidence.

(vii) Continuing the injunctions until the trial would, if the Attorney General's claims then failed, merely delay but not prevent the newspapers' right to publish information which, moreover, related to events that had taken place many years in the past.

(viii) In the overall interests of justice, a course which could only result in temporary and in no way irrevocable damage to the cause of the newspapers was to be preferred to one which might result in permanent and irrevocable damage to the cause of the Attorney General.

(b) Lord Templeman (who agreed with the observations of Lords Brandon and Ackner)

(i) The appeal involved a conflict between the right of the public to be protected by the Security Service and its right to be supplied with full information by the press. It therefore involved consideration of the Convention, the question being whether the interference constituted by the injunctions was, on 30 July 1987, necessary in a democratic society for one or more of the purposes listed in Article 10 para. 2 (art. 10-2).

(ii) In terms of the Convention, the restraints were necessary in the interests of national security, for protecting the reputation or rights of others, for preventing the disclosure of information received in confidence and for maintaining the authority of the judiciary. The restraints would prevent harm to the Security Service, notably in the form of the mass circulation, both now and in the future, of accusations to which its members

could not respond. To discharge the injunctions would surrender to the press the power to evade a court order designed to protect the confidentiality of information obtained by a member of the Service.

(c) Lord Ackner (who agreed with the observations of Lord Templeman)

(i) It was accepted by all members of the Appellate Committee that: the Attorney General had an arguable case for a permanent injunction; damages were a worthless remedy for the Crown which, if the Millett injunctions were not continued, would lose forever the prospect of obtaining permanent injunctions at the trial; continuation of the Millett injunctions was not a "final locking-out" of the press which, if successful at the trial, would then be able to publish material that had no present urgency; there was a real public interest, that required protection, concerned with the efficient functioning of the Security Service and it extended, as was not challenged by the newspapers, to discouraging the use of the United Kingdom market for the dissemination of unauthorised memoirs of Security Service officers.

(ii) It would thus be a denial of justice to refuse to allow the injunctions to continue until the trial, for that would sweep aside the public-interest factor without any trial and would prematurely and permanently deny the Attorney General any protection from the courts.

(d) Lord Bridge of Harwich

(i) The case in favour of maintaining the Millett injunctions - which had been properly granted in the first place - would not be stronger at the trial than it was now; it would be absurd to continue them temporarily if no case for permanent injunctions could be made out.

(ii) Since the Spycatcher allegations were now freely available to the public, it was manifestly too late for the injunctions to serve the interest of national security in protecting sensitive information.

(iii) It could be assumed that the Attorney General could still assert a bare duty binding on the newspapers, but the question was whether the Millett injunctions could still protect an interest of national security of sufficient weight to justify the resultant encroachment on freedom of speech. The argument that their continuation would have a deterrent effect was of minimal weight.

(iv) The attempt to insulate the British public from information freely available elsewhere was a significant step down the road to censorship characteristic of a totalitarian regime and, if pursued, would lead to the Government's condemnation and humiliation by the European Court of Human Rights.

(e) Lord Oliver of Aylmerton

(i) Mr Justice Millett's initial order was entirely correct.

(ii) The injunctions had originally been imposed to preserve the confidentiality of what were at the time unpublished allegations, but that confidentiality had now been irrevocably destroyed by the publication of *Spycatcher*. It was questionable whether it was right to use the injunctive remedy against the newspapers (who had not been concerned with that publication) for the remaining purpose which the injunctions might serve, namely punishing Mr Wright and providing an example to others.

(iii) The newspapers had presented their arguments on the footing that the Attorney General still had an arguable case for the grant of permanent injunctions and there was force in the view that the difficult and novel point of law involved should not be determined without further argument at the trial. However, in the light of the public availability of the *Spycatcher* material, it was difficult to see how it could be successfully argued that the newspapers should be permanently restrained from publishing it and the case of the Attorney General was unlikely to improve in the meantime. No arguable case for permanent injunctions at the trial therefore remained and the Millett injunctions should accordingly be discharged.

H. Conclusion of the Australian proceedings; further publication of *Spycatcher*

37. On 24 September 1987 the New South Wales Court of Appeal delivered judgment dismissing the Attorney General's appeal (see paragraph 21 above); the majority held that his claim was not justiciable in an Australian court since it involved either an attempt to enforce indirectly the public laws of a foreign State or a determination of the question whether publication would be detrimental to the public interest in the United Kingdom.

The Attorney General appealed to the High Court of Australia. In view of the publication of *Spycatcher* in the United States and elsewhere, that court declined to grant temporary injunctions restraining its publication in Australia pending the hearing; it was published in that country on 13 October. The appeal was dismissed on 2 June 1988, on the ground that, under international law, a claim - such as the Attorney General's - to enforce British governmental interests in its security service was unenforceable in the Australian courts.

Further proceedings brought by the Attorney General against newspapers for injunctions were successful in Hong Kong but not in New Zealand.

38. In the meantime publication and dissemination of *Spycatcher* and its contents continued worldwide, not only in the United States (around 715,000 copies were printed and nearly all were sold by October 1987) and in Canada (around 100,000 copies printed), but also in Australia (145,000 copies printed, of which half were sold within a month) and Ireland (30,000 copies printed and distributed). Nearly 100,000 copies were sent to various

European countries other than the United Kingdom and copies were distributed from Australia in Asian countries. Radio broadcasts in English about the book were made in Denmark and Sweden and it was translated into twelve other languages, including ten European.

III. THE SUBSTANTIVE PROCEEDINGS IN ENGLAND

A. Breach of confidence

39. On 27 October 1987 the Attorney General instituted proceedings against S.T. for breach of confidence; in addition to injunctive relief, he sought a declaration and an account of profits. The substantive trial of that action and of his actions against O.G. (see paragraph 15 above) - in which, by an amendment of 30 October, he now claimed a declaration as well as an injunction - took place before Mr Justice Scott in the High Court in November-December 1987. He heard evidence on behalf of all parties, the witnesses including Sir Robert Armstrong (see paragraph 16 above). He also continued the interlocutory injunctions, pending delivery of his judgment.

40. Mr Justice Scott gave judgment on 21 December 1987; it contained the following observations and conclusions.

(a) The ground for the Attorney General's claim for permanent injunctions was no longer the preservation of the secrecy of certain information but the promotion of the efficiency and reputation of the Security Service.

(b) Where a duty of confidence is sought to be enforced against a newspaper coming into possession of information known to be confidential, the scope of its duty will depend on the relative weights of the interests claimed to be protected by that duty and the interests served by disclosure.

(c) Account should be taken of Article 10 (art. 10) of the Convention and the judgments of the European Court establishing that a limitation of free expression in the interests of national security should not be regarded as necessary unless there was a "pressing social need" for the limitation and it was "proportionate to the legitimate aims pursued".

(d) Mr Wright owed a duty to the Crown not to disclose any information obtained by him in the course of his employment in MI5. He broke that duty by writing *Spycatcher* and submitting it for publication, and the subsequent publication and dissemination of the book amounted to a further breach, so that the Attorney General would be entitled to an injunction against Mr Wright or any agent of his, restraining publication of *Spycatcher* in the United Kingdom.

(e) O.G. were not in breach of their duty of confidentiality, created by being recipients of Mr Wright's unauthorised disclosures, in publishing

their respective articles of 22 and 23 June 1986 (see paragraph 14 above): the articles were a fair report in general terms of the forthcoming trial in Australia and, furthermore, disclosure of two of Mr Wright's allegations was justified on an additional ground relating to the disclosure of "iniquity".

(f) S.T., on the other hand, had been in breach of the duty of confidentiality in publishing the first instalment of extracts from the book on 12 July 1987 (see paragraph 27 above), since those extracts contained certain material which did not raise questions of public interest outweighing those of national security.

(g) S.T. were liable to account for the profits accruing to them as a result of the publication of that instalment.

(h) The Attorney General's claims for permanent injunctions failed because the publication and worldwide dissemination of Spycatcher since July 1987 had had the result that there was no longer any duty of confidence lying on newspapers or other third parties in relation to the information in the book; as regards this issue, a weighing of the national security factors relied on against the public interest in freedom of the press showed the latter to be overwhelming.

(i) The Attorney General was not entitled to a general injunction restraining future publication of information derived from Mr Wright or other members of the Security Service.

After hearing argument, Mr Justice Scott imposed fresh temporary injunctions pending an appeal to the Court of Appeal; those injunctions contained a proviso allowing reporting of the Australian proceedings (see paragraphs 19 and 35 above).

41. On appeal by the Attorney General and a cross-appeal by S.T., the Court of Appeal (composed of Sir John Donaldson, Master of the Rolls, Lord Justice Dillon and Lord Justice Bingham) affirmed, on 10 February 1988, the decision of Mr Justice Scott.

However, Sir John Donaldson disagreed with his view that the articles in the Observer and The Guardian had not constituted a breach of their duty of confidence and that the claim for an injunction against these two newspapers in June 1986 was not "proportionate to the legitimate aim pursued". Lord Justice Bingham, on the other hand, disagreed with Mr Justice Scott's view that S.T. had been in breach of duty by publishing the first instalment of extracts from Spycatcher, that they should account for profits and that the Attorney General had been entitled, in the circumstances as they stood in July 1987, to injunctions preventing further serialisation.

After hearing argument, the Court of Appeal likewise granted fresh temporary injunctions, pending an appeal to the House of Lords; O.G. and S.T. were given liberty to apply for variation or discharge if any undue delay arose.

42. On 13 October 1988 the Appellate Committee of the House of Lords (Lord Keith of Kinkel, Lord Brightman, Lord Griffiths, Lord Goff of

Chieveley and Lord Jauncey of Tullichettle) also affirmed Mr Justice Scott's decision. Dismissing an appeal by the Attorney General and a cross-appeal by S.T., it held:

"(i) That a duty of confidence could arise in contract or in equity and a confidant who acquired information in circumstances importing such a duty should be precluded from disclosing it to others; that a third party in possession of information known to be confidential was bound by a duty of confidence unless the duty was extinguished by the information becoming available to the general public or the duty was outweighed by a countervailing public interest requiring disclosure of the information; that in seeking to restrain the disclosure of government secrets the Crown must demonstrate that disclosure was likely to damage or had damaged the public interest before relief could be granted; that since the world-wide publication of *Spycatcher* had destroyed any secrecy as to its contents, and copies of it were readily available to any individual who wished to obtain them, continuation of the injunctions was not necessary; and that, accordingly, the injunctions should be discharged.

(ii) (Lord Griffiths dissenting) that the articles of 22 and 23 June [1986] had not contained information damaging to the public interest; that the Observer and The Guardian were not in breach of their duty of confidentiality when they published [those] articles; and that, accordingly, the Crown would not have been entitled to a permanent injunction against both newspapers.

(iii) That The Sunday Times was in breach of its duty of confidence in publishing its first serialised extract from *Spycatcher* on 12 July 1987; that it was not protected by either the defence of prior publication or disclosure of iniquity; that imminent publication of the book in the United States did not amount to a justification; and that, accordingly, The Sunday Times was liable to account for the profits resulting from that breach.

(iv) That since the information in *Spycatcher* was now in the public domain and no longer confidential no further damage could be done to the public interest that had not already been done; that no injunction should be granted against the Observer and The Guardian restraining them from reporting on the contents of the book; and that (Lord Griffiths dissenting) no injunction should be granted against The Sunday Times to restrain serialising of further extracts from the book.

(v) That members and former members of the Security Service owed a lifelong duty of confidence to the Crown, and that since the vast majority of them would not disclose confidential information to the newspapers it would not be appropriate to grant a general injunction to restrain the newspapers from future publication of any information on the allegations in *Spycatcher* derived from any member or former member of the Security Service."

B. Contempt of court

43. The substantive trial of the Attorney General's actions for contempt of court against The Independent, The London Evening Standard, the London Daily News (see paragraph 22 above), S.T. (see paragraph 27 above) and certain other newspapers took place before Mr Justice Morritt in

the High Court in April 1989. On 8 May he held, *inter alia*, that The Independent and S.T. had been in contempt of court and imposed a fine of £50,000 in each case.

44. On 27 February 1990 the Court of Appeal dismissed appeals by the latter two newspapers against the finding that they had been in contempt but concluded that no fines should be imposed. A further appeal by S.T. against the contempt finding was dismissed by the Appellate Committee of the House of Lords on 11 April 1991.

PROCEEDINGS BEFORE THE COMMISSION

45. In their application (no. 13585/88) lodged with the Commission on 27 January 1988, O.G. alleged that the interlocutory injunctions in question constituted an unjustified interference with their freedom of expression, as guaranteed by Article 10 (art. 10) of the Convention. They further claimed that, contrary to Article 13 (art. 13), they had no effective remedy before a national authority for their Article 10 (art. 10) complaint and that they were victims of discrimination in breach of Article 14 (art. 14).

46. The Commission declared the application admissible on 5 October 1989. In its report of 12 July 1990 (Article 31) (art. 31), it expressed the opinion:

(a) by six votes to five, that there had been a violation of Article 10 (art. 10) in respect of temporary injunctions imposed on O.G. for the period from 11 July 1986 to 30 July 1987;

(b) unanimously, that there had been a violation of Article 10 (art. 10) in respect of temporary injunctions imposed on O.G. for the period from 30 July 1987 to 13 October 1988;

(c) unanimously, that there had been no violation of Article 13 or Article 14 (art. 13, art. 14) .

The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment* .

* Note by the Registrar: For practical reasons this annex will appear only with the printed version of the judgment (volume 216 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS MADE TO THE COURT BY THE GOVERNMENT

47. At the hearing on 25 June 1991, the Government invited the Court to make the findings set out in their memorial, namely that there had been no breach of O.G.'s rights under Articles 10, 13 or 14 (art. 10, art. 13, art. 14).

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10) OF THE CONVENTION

48. O.G. alleged that, by reason of the interlocutory injunctions to which they had been subject from 11 July 1986 to 13 October 1988, they had been victims of a violation of Article 10 (art. 10) of the Convention, which provides as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

This allegation was contested by the Government. It was accepted by the Commission, by a majority as regards the period from 11 July 1986 to 30 July 1987 and unanimously as regards the period from 30 July 1987 to 13 October 1988.

49. The restrictions complained of clearly constituted, as was not disputed, an "interference" with O.G.'s exercise of their freedom of expression, as guaranteed by paragraph 1 of Article 10 (art. 10-1). Such an interference entails a violation of Article 10 (art. 10) if it does not fall within one of the exceptions provided for in paragraph 2 (art. 10-2); the Court must therefore examine in turn whether the interference was "prescribed by law", whether it had an aim or aims that is or are legitimate under Article 10 para. 2 (art. 10-2) and whether it was "necessary in a democratic society" for the aforesaid aim or aims.

A. Was the interference "prescribed by law"?

50. O.G. did not deny that the grant of the interlocutory injunctions was in accordance with domestic law. Although they laid no emphasis on this point at the hearing, they did maintain in their memorial that the interference complained of was not "prescribed by law" for the purposes of Article 10 (art. 10). This contention was challenged by the Government and was not accepted by the Commission.

51. It is true that the Attorney General's actions for breach of confidence raised issues of law which were not clarified until judgment had been given on the merits. However, O.G.'s complaint was not directed to this aspect of the case, but solely to the legal principles upon which the injunctions were granted, which principles were, in their submission, neither adequately accessible nor sufficiently foreseeable (see the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 31, para. 49).

52. In the Court's view, no problem arises concerning accessibility, since the relevant guidelines had been enunciated by the House of Lords several years previously, in 1975, in *American Cyanamid Co. v. Ethicon Ltd* (see paragraph 10 above).

53. (a) As regards foreseeability, O.G. advanced three specific arguments.

(i) It was not clear whether the *American Cyanamid* decision had overruled certain earlier rules relating to the grant of injunctions in particular areas of the law. The Court notes, however, that O.G. themselves recognised that the principles laid down in that decision had been expressed to be applicable to all classes of action.

(ii) There had never been a case similar to theirs in which the *American Cyanamid* principles had been applied. This fact, in the Court's view, is of little consequence in the present context: since the principles were expressed to be of general application, recourse had perforce to be had to them from time to time in novel situations, so that their utilisation on this occasion involved no more than the application of existing rules to a different set of circumstances.

(iii) It was not until judgment was given on the merits of the Attorney General's actions (see paragraphs 39-42 above) that it became clear that an injunction would be granted in a case of this kind only on proof of potential detriment to the public interest. This, however, suggests that there was a greater likelihood of a restriction being imposed under the law as it stood previously.

(b) More generally, having examined the *American Cyanamid* principles in the light of its above-mentioned Sunday Times judgment (Series A no. 30), and especially paragraph 49 thereof, the Court entertains no doubt that they were formulated with a degree of precision that is sufficient in a matter of this kind. It considers that O.G. must have been able to foresee, to an

extent that was reasonable in the circumstances, a risk that the interlocutory injunctions would be imposed.

54. The interference was accordingly "prescribed by law".

B. Did the interference have aims that are legitimate under Article 10 para. 2 (art. 10-2)?

55. The Government submitted that the interlocutory injunctions were designed to protect the Attorney General's rights at the substantive trial and therefore had the aim, that was legitimate in terms of paragraph 2 of Article 10 (art. 10-2), of "maintaining the authority of the judiciary". Before the Court, they also asserted that the injunctions indirectly served the aim of protecting national security, since the underlying purpose of the Attorney General's actions was to prevent the effective operation of the Security Service from being undermined.

Although O.G. expressed certain reservations on the second of these points, they did not seek to deny that the interference had a legitimate aim.

56. The Court is satisfied that the injunctions had the direct or primary aim of "maintaining the authority of the judiciary", which phrase includes the protection of the rights of litigants (see the above-mentioned Sunday Times judgment, Series A no. 30, p. 34, para. 56). Perusal of the relevant domestic judgments makes it perfectly clear that the purpose of the order made against O.G. was - to adopt the description given by Lord Oliver of Aylmerton (*Attorney General v. Times Newspapers Ltd* [1991] 2 Weekly Law Reports 1019G) - "to enable issues between the plaintiff and the defendants to be tried without the plaintiff's rights in the meantime being prejudiced by the doing of the very act which it was the purpose of the action to prevent".

It is also incontrovertible that a further purpose of the restrictions complained of was the protection of national security. They were imposed, as has just been seen, with a view to ensuring a fair trial of the Attorney General's claim for permanent injunctions against O.G. and the evidential basis for that claim was the two affidavits sworn by Sir Robert Armstrong, in which he deposed to the potential damage which publication of the Spycatcher material would cause to the Security Service (see paragraph 16 above). Not only was that evidence relied on by Mr Justice Millett when granting the injunctions initially (see paragraph 18 (e) above), but considerations of national security featured prominently in all the judgments delivered by the English courts in this case (see paragraphs 18, 34, 36 and 40 above). The Court would only comment - and it will revert to this point in paragraph 69 below - that the precise nature of the national security considerations involved varied over the course of time.

57. The interference complained of thus had aims that were legitimate under paragraph 2 of Article 10 (art. 10-2).

C. Was the interference "necessary in a democratic society"?

58. Argument before the Court was concentrated on the question whether the interference complained of could be regarded as "necessary in a democratic society". After summarising the relevant general principles that emerge from its case-law, the Court will, like the Commission, examine this issue with regard to two distinct periods, the first running from 11 July 1986 (imposition of the Millett injunctions) to 30 July 1987 (continuation of those measures by the House of Lords), and the second from 30 July 1987 to 13 October 1988 (final decision on the merits of the Attorney General's actions for breach of confidence).

1. General principles

59. The Court's judgments relating to Article 10 (art. 10) - starting with *Handyside* (7 December 1976; Series A no. 24), concluding, most recently, with *Oberschlick* (23 May 1991; Series A no. 204) and including, amongst several others, *Sunday Times* (26 April 1979; Series A no. 30) and *Lingens* (8 July 1986; Series A no. 103) - enounce the following major principles.

(a) Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10 (art. 10), is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.

(b) These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, *inter alia*, in the "interests of national security" or for "maintaining the authority of the judiciary", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".

(c) The adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (art. 10).

(d) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review

under Article 10 (art. 10) the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

60. For the avoidance of doubt, and having in mind the written comments that were submitted in this case by "Article 19" (see paragraph 6 above), the Court would only add to the foregoing that Article 10 (art. 10) of the Convention does not in terms prohibit the imposition of prior restraints on publication, as such. This is evidenced not only by the words "conditions", "restrictions", "preventing" and "prevention" which appear in that provision, but also by the Court's *Sunday Times* judgment of 26 April 1979 and its *Markt intern Verlag GmbH* and *Klaus Beermann* judgment of 20 November 1989 (Series A no. 165). On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.

2. The period from 11 July 1986 to 30 July 1987

61. In assessing the necessity for the interference with O.G.'s freedom of expression during the period from 11 July 1986 to 30 July 1987, it is essential to have a clear picture of the factual situation that obtained when Mr Justice Millett first imposed the injunctions in question.

At that time O.G. had only published two short articles which, in their submission, constituted fair reports concerning the issues in the forthcoming hearing in Australia; contained information that was of legitimate public concern, that is to say allegations of impropriety on the part of officers of the British Security Service; and repeated material which, with little or no action on the part of the Government to prevent this, had for the most part already been made public.

Whilst substantially correct, these submissions do not tell the whole story. They omit, in the first place, O.G.'s acknowledgment, before Mr Justice Millett, that they wished to be free to publish further information deriving directly or indirectly from Mr Wright and disclosing alleged unlawful activity on the part of the Security Service, whether or not it had been previously published (see paragraph 18 (b) above). What they also omit is the fact that in July 1986 *Spycatcher* existed only in manuscript form. It was not then known precisely what the book would contain and, even if the previously-published material furnished some clues in this respect, it might have been expected that the author would seek to say

something new. And it was not unreasonable to suppose that where a former senior employee of a security service - an "insider", such as Mr Wright - proposed to publish, without authorisation, his memoirs, there was at least a risk that they would comprise material the disclosure of which might be detrimental to that service; it has to be borne in mind that in such a context damaging information may be gleaned from an accumulation of what appear at first sight to be unimportant details. What is more, it was improbable in any event that all the contents of the book would raise questions of public concern outweighing the interests of national security.

62. Mr Justice Millett's decision to grant injunctions - which, in the subsequent stages of the interlocutory proceedings, was accepted as correct not only by the Court of Appeal but also by all the members of the Appellate Committee of the House of Lords (see paragraph 18 in fine above) - was based on the following line of reasoning. The Attorney General was seeking a permanent ban on the publication of material the disclosure of which would, according to the credible evidence presented on his behalf, be detrimental to the Security Service; to refuse interlocutory injunctions would mean that O.G. would be free to publish that material immediately and before the substantive trial; this would effectively deprive the Attorney General, if successful on the merits, of his right to be granted a permanent injunction, thereby irrevocably destroying the substance of his actions and, with it, the claim to protect national security.

In the Court's view, these reasons were "relevant" in terms of the aims both of protecting national security and of maintaining the authority of the judiciary. The question remains whether they were "sufficient".

63. In this connection, O.G. objected that the interlocutory injunctions had been granted on the basis of the American Cyanamid principles which, in their opinion, were incompatible with the criteria of Article 10 (art. 10). They maintained that, in a case of this kind, those principles were unduly advantageous to the plaintiff since he had to establish only that he had an arguable case and that the balance of convenience lay in favour of injunctive relief; in their submission, a stricter test of necessity had to be applied when it was a question of restricting publication by the press on a matter of considerable public interest.

The American Cyanamid case admittedly related to the alleged infringement of a patent and not to freedom of the press. However, it is not the Court's function to review those principles in abstracto, but rather to determine whether the interference resulting from their application was necessary having regard to the facts and circumstances prevailing in the specific case before it (see the above-mentioned Sunday Times judgment, Series A no. 30, p. 41, para. 65).

In any event, perusal of the relevant judgments reveals that the English courts did far more than simply apply the American Cyanamid principles inflexibly or automatically; they recognised that the present case involved a

conflict between the public interest in preventing and the public interest in allowing disclosure of the material in question, which conflict they resolved by a careful weighing of the relevant considerations on either side.

In forming its own opinion, the Court has borne in mind its observations concerning the nature and contents of Spycatcher (see paragraph 61 above) and the interests of national security involved; it has also had regard to the potential prejudice to the Attorney General's breach of confidence actions, this being a point that has to be seen in the context of the central position occupied by Article 6 (art. 6) of the Convention and its guarantee of the right to a fair trial (see the above-mentioned Sunday Times judgment, Series A no. 30, p. 34, para. 55). Particularly in the light of these factors, the Court takes the view that, having regard to their margin of appreciation, the English courts were entitled to consider the grant of injunctive relief to be necessary and that their reasons for so concluding were "sufficient" for the purposes of paragraph 2 of Article 10 (art. 10-2).

64. It has nevertheless to be examined whether the actual restraints imposed were "proportionate" to the legitimate aims pursued.

In this connection, it is to be noted that the injunctions did not erect a blanket prohibition. Whilst they forbade the publication of information derived from or attributed to Mr Wright in his capacity as a member of the Security Service, they did not prevent O.G. from pursuing their campaign for an independent inquiry into the operation of that service (see paragraph 14 above). Moreover, they contained provisos excluding certain material from their scope, notably that which had been previously published in the works of Mr Chapman Pincher and in the Granada Television programmes (see paragraph 19 above). Again, it was open to O.G. at any time to seek - as they in fact did (see paragraphs 23 and 26 above) - variation or discharge of the orders.

It is true that although the injunctions were intended to be no more than temporary measures, they in fact remained in force - as far as the period now under consideration is concerned - for slightly more than a year. And this is a long time where the perishable commodity of news is concerned (see paragraph 60 above). As against this, it may be pointed out that the Court of Appeal (see paragraph 19 above) certified the case as fit for a speedy trial - which O.G. apparently did not seek - and that the news in question, relating as it did to events that had occurred several years previously, could not really be classified as urgent. Furthermore, the Attorney General's actions raised difficult issues of both fact and law: time was accordingly required for the preparation of the trial, especially since, as Lord Brandon of Oakbrook pointed out (see paragraph 36 (a) (v) above), they were issues on which evidence had to be adduced and subjected to cross-examination.

65. Having regard to the foregoing, the Court concludes that, as regards the period from 11 July 1986 to 30 July 1987, the national authorities were

entitled to think that the interference complained of was "necessary in a democratic society".

3. The period from 30 July 1987 to 13 October 1988

66. On 14 July 1987 *Spycatcher* was published in the United States of America (see paragraph 28 above). This changed the situation that had obtained since 11 July 1986. In the first place, the contents of the book ceased to be a matter of speculation and their confidentiality was destroyed. Furthermore, Mr Wright's memoirs were obtainable from abroad by residents of the United Kingdom, the Government having made no attempt to impose a ban on importation (see paragraph 29 above).

67. In the submission of the Government, the continuation of the interlocutory injunctions during the period from 30 July 1987 to 13 October 1988 nevertheless remained "necessary", in terms of Article 10 (art. 10), for maintaining the authority of the judiciary and thereby protecting the interests of national security. They relied on the conclusion of the House of Lords in July 1987 that, notwithstanding the United States publication: (a) the Attorney General still had an arguable case for permanent injunctions against O.G., which case could be fairly determined only if restraints on publication were imposed pending the substantive trial; and (b) there was still a national security interest in preventing the general dissemination of the contents of the book through the press and a public interest in discouraging the unauthorised publication of memoirs containing confidential material.

68. The fact that the further publication of *Spycatcher* material could have been prejudicial to the trial of the Attorney General's claims for permanent injunctions was certainly, in terms of the aim of maintaining the authority of the judiciary, a "relevant" reason for continuing the restraints in question. The Court finds, however, that in the circumstances it does not constitute a "sufficient" reason for the purposes of Article 10 (art. 10).

It is true that the House of Lords had regard to the requirements of the Convention, even though it is not incorporated into domestic law (see paragraph 36 above). It is also true that there is some difference between the casual importation of copies of *Spycatcher* into the United Kingdom and mass publication of its contents in the press. On the other hand, even if the Attorney General had succeeded in obtaining permanent injunctions at the substantive trial, they would have borne on material the confidentiality of which had been destroyed in any event - and irrespective of whether any further disclosures were made by O.G. - as a result of the publication in the United States. Seen in terms of the protection of the Attorney General's rights as a litigant, the interest in maintaining the confidentiality of that material had, for the purposes of the Convention, ceased to exist by 30 July 1987 (see, *mutatis mutandis*, the Weber judgment of 22 May 1990, Series A no. 177, p. 23, para. 51).

69. As regards the interests of national security relied on, the Court observes that in this respect the Attorney General's case underwent, to adopt the words of Mr Justice Scott, "a curious metamorphosis" (*Attorney General v. Guardian Newspapers Ltd* (no. 2) [1990] 1 Appeal Cases 140F). As emerges from Sir Robert Armstrong's evidence (see paragraph 16 above), injunctions were sought at the outset, *inter alia*, to preserve the secret character of information that ought to be kept secret. By 30 July 1987, however, the information had lost that character and, as was observed by Lord Brandon of Oakbrook (see paragraph 36 (a) (iv) above), the major part of the potential damage adverted to by Sir Robert Armstrong had already been done. By then, the purpose of the injunctions had thus become confined to the promotion of the efficiency and reputation of the Security Service, notably by: preserving confidence in that Service on the part of third parties; making it clear that the unauthorised publication of memoirs by its former members would not be countenanced; and deterring others who might be tempted to follow in Mr Wright's footsteps.

The Court does not regard these objectives as sufficient to justify the continuation of the interference complained of. It is, in the first place, open to question whether the actions against O.G. could have served to advance the attainment of these objectives any further than had already been achieved by the steps taken against Mr Wright himself. Again, bearing in mind the availability of an action for an account of profits (see paragraphs 39-42 above), the Court shares the doubts of Lord Oliver of Aylmerton (see paragraph 36 (e)(ii) above) as to whether it was legitimate, for the purpose of punishing Mr Wright and providing an example to others, to use the injunctive remedy against persons, such as O.G., who had not been concerned with the publication of *Spycatcher*. Above all, continuation of the restrictions after July 1987 prevented newspapers from exercising their right and duty to purvey information, already available, on a matter of legitimate public concern.

70. Having regard to the foregoing, the Court concludes that the interference complained of was no longer "necessary in a democratic society" after 30 July 1987.

D. Conclusion

71. To sum up, there was a violation of Article 10 (art. 10) from 30 July 1987 to 13 October 1988, but not from 11 July 1986 to 30 July 1987.

II. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, TAKEN IN CONJUNCTION WITH ARTICLE 10 (art. 14+10)

72. O.G. complained that newspapers published abroad, which could be freely imported into the United Kingdom, were not bound by the

interlocutory injunctions; they thus had an advantage over the Observer and The Guardian in that country as well as in the latter's overseas markets. O.G. alleged that on this account they had been victims of a violation of Article 14 of the Convention taken in conjunction with Article 10 (art. 14+10), the former provision reading as follows:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

73. The factual basis for the foregoing complaint was in part contested by the Government, who maintained that the publishers and distributors of foreign newspapers within the United Kingdom would, by operation of the law of contempt of court (see paragraph 30 above), equally have been subject to the restraints in question. In any event, the Court agrees with the Government and the Commission that this complaint has to be rejected.

Article 14 (art. 14) affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations (see, for example, the *Fredin* judgment of 18 February 1991, Series A no. 192, p. 19, para. 60). If and in so far as foreign newspapers were subject to the same restrictions as O.G., there was no difference of treatment. If and in so far as they were not, this was because they were not subject to the jurisdiction of the English courts and hence were not in a situation similar to that of O.G.

74. There was thus no violation of Article 14 taken in conjunction with Article 10 (art. 14+10).

III. ALLEGED VIOLATION OF ARTICLE 13 (art. 13) OF THE CONVENTION

75. O.G. complained of the fact that the English courts did not apply the proper principles in relation to Article 10 (art. 10) and that neither that provision nor the case-law relevant thereto had been incorporated into English law. They alleged that on this account they had been victims of a violation of Article 13 (art. 13) of the Convention, which provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

76. The Court agrees with the Government and the Commission that this allegation has to be rejected.

The thrust of O.G.'s complaint under the Convention was that the imposition of interlocutory injunctions constituted an unjustified interference with their freedom of expression and it is clear that they not only could but also did raise this issue in substance before the domestic

courts. And it has to be recalled that the effectiveness of a remedy, for the purposes of Article 13 (art. 13), does not depend on the certainty of a favourable outcome (see the Soering judgment of 7 July 1989, Series A no. 161, p. 48, para. 122).

As regards the specific matters pleaded, the Court has held on several occasions that there is no obligation to incorporate the Convention into domestic law (see, for example, the James and Others judgment of 21 February 1986, Series A no. 98, p. 47, para. 84). Again, Article 13 (art. 13) does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention (see the same judgment, p. 47, para. 85).

77. There has accordingly been no violation of Article 13 (art. 13).

IV. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

78. Under Article 50 (art. 50) of the Convention,

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

O. G. made no claim for compensation for damage, but they did seek under also o this provision reimbursement of their legal costs and expenses in the domestic and the Strasbourg proceedings, in a total amount of £212,430.28.

The Court has examined this issue in the light of the criteria established in its case-law and of the observations submitted by the Government and the applicants.

A. The domestic proceedings

79. The claim in respect of the domestic proceedings totalled £137,825.05. It did not extend to the 1987 hearing before the Vice-Chancellor (see paragraphs 32-33 above), the costs of which had already been paid by the Government to the applicants. Its breakdown is as follows:

(a) for the Court of Appeal hearing ended on 25 July 1986 (see paragraph 19 above): £55,624.11 (composed of £23,526.23 for the fees and disbursements of the applicants' solicitors and counsel, £17,364.29 for interest thereon for the period from 25 July 1986 to 25 June 1991 and £14,733.59 for the costs and interest paid by the applicants to the Attorney General);

(b) for the Court of Appeal hearing ended on 24 July 1987 (see paragraph 34 above): £31,098.20 (composed of £14,310.29 for the fees and

disbursements of the applicants' solicitors and counsel, £8,421.50 for interest thereon for the period from 24 July 1987 to 25 June 1991 and £8,366.41 for the costs and interest paid by the applicants to the Attorney General);

(c) for the House of Lords hearing ended on 30 July 1987 (see paragraphs 35-36 above): £51,102.74 (composed of £43,102.74 for the fees and disbursements of the applicants' solicitors and counsel and £8,000 for the costs paid by the applicants to the Attorney General).

80. The Court's observations on this claim are as follows.

(a) Having found no violation in respect of the period from 11 July 1986 to 30 July 1987 (see paragraphs 61-65 and 71 above), it agrees with the Government that no award should be made in respect of costs referable to the 1986 Court of Appeal hearing. However, the same does not apply to those referable to the 1987 Court of Appeal hearing: although the latter proceedings took place within the period in question, they post-dated the publication of *Spycatcher* in the United States of America (see paragraphs 28-29 above) and, like those before the House of Lords in 1987, are to be regarded as an attempt to obtain, through the domestic legal order, prevention of the violation that the Court has found to have occurred in the period from 30 July 1987 to 13 October 1988 (see paragraphs 66-71 above).

(b) The Court is unable to accept the Government's submission that the extra costs attributable to the fact that the Observer applicants and the Guardian applicants were represented by different firms of solicitors should be disallowed. They were entitled to instruct such lawyers as they chose. Nevertheless, bearing in mind that the interests of both sets of applicants were substantially the same, the Court shares the Government's view that the charges for the services of the total number of fee earners involved cannot all be considered to have been "necessarily" incurred.

(c) The Court also agrees with the Government's submission that the costs charged by the solicitors concerned cannot be regarded as reasonable as to quantum for the purposes of Article 50 (art. 50); furthermore, it also accepts that some reduction should be made in the amount claimed for counsel's fees before the House of Lords.

(d) The Court notes that, as regards the 1987 Court of Appeal hearing, the Government have raised no objection to the applicants' claim for interest and that the sum paid by the latter to the Attorney General itself included interest.

81. Having regard to the foregoing, the Court awards to the applicants, in respect of their own costs (including interest on those incurred in the Court of Appeal) and the amounts paid by them to the Attorney General, the sum of £65,000.

B. The Strasbourg proceedings

82. On the applicants' claim in respect of costs and expenses referable to the Strasbourg proceedings (totalling £74,605.23), the Court's observations are as follows.

(a) A reduction should be made to reflect the fact that no violation was found to have occurred in the period from 11 July 1986 to 30 July 1987. On the other hand, it would not be appropriate to make a significant reduction in respect of the unsuccessful complaints of breach of Articles 13 and 14 (art. 13, art. 14) (see paragraphs 72-77 above), since the bulk of the work done by the applicants' advisers related to Article 10 (art. 10) (see, *mutatis mutandis*, the Granger judgment of 28 March 1990, Series A no. 174, p. 21, para. 55).

(b) The remarks in paragraph 80(c) above concerning the solicitors' charges apply equally to the Strasbourg proceedings.

The Court also considers that, in the circumstances, certain of the amounts claimed by way of counsel's fees exceed what can be regarded as reasonable as between the parties.

83. Having regard to the foregoing, the Court awards the sum of £35,000.

C. Conclusion

84. The total amount to be paid to the applicants is accordingly £100,000. This figure is to be increased by any value-added tax that may be chargeable.

FOR THESE REASONS, THE COURT

1. Holds by fourteen votes to ten that there was no violation of Article 10 (art. 10) of the Convention during the period from 11 July 1986 to 30 July 1987;
2. Holds unanimously that there was a violation of Article 10 (art. 10) during the period from 30 July 1987 to 13 October 1988;
3. Holds unanimously that there has been no violation of Article 13 (art. 13) or of Article 14 taken in conjunction with Article 10 (art. 14+10);
4. Holds unanimously that the United Kingdom is to pay, within three months, to the applicants jointly the sum of £100,000 (one hundred thousand pounds), together with any value-added tax that may be chargeable, for costs and expenses;

5. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 26 November 1991.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) partly dissenting opinion of Mr Pettiti, joined by Mr Pinheiro Farinha;
- (b) partly dissenting opinion of Mr Walsh;
- (c) partly dissenting opinion of Mr De Meyer (concerning prior restraint), joined by Mr Pettiti, Mr Russo, Mr Foighel and Mr Bigi;
- (d) separate opinion of Mr De Meyer (concerning domestic remedies), joined by Mr Pettiti;
- (e) separate opinion of Mr Valticos;
- (f) partly dissenting opinion of Mr Martens;
- (g) partly dissenting opinion of Mr Pekkanen; (h) partly dissenting opinion of Mr Morenilla.

R.R.
M.-A.E.

PARTLY DISSENTING OPINION OF JUDGE PETTITI,
JOINED BY JUDGE PINHEIRO FARINHA*(Translation)*

I voted for a violation of Article 10 (art. 10) also in respect of the first period, unlike the majority. In my view there was a violation as much for the first period concerning the Observer and The Guardian as for the second which also concerned The Sunday Times. Indeed I consider it to be contradictory to adopt a different position on these two periods while reaffirming the fundamental value in a democracy of the freedom of expression.

The injunction originated in the proposal to publish in Australia in 1985 Mr Wright's memoirs which included material already revealed by the books of Mr Pincher and by the Granada television programmes in the United Kingdom. "Secret agents" often publish their memoirs after their retirement and this does not in general give cause for concern to the States in question. The pretext for the proceedings instituted in Australia was not a betrayal of State secrets but a breach of confidentiality. The articles in the Observer and The Guardian of June 1986 concerned similar facts. The courts concluded that the source of the material was Spycatcher's publishers. The proceedings instituted by the Attorney General were founded on the breach of confidentiality. The interlocutory injunction issued by Mr Justice Millett in July 1986, based on a failure to comply with the duty of discretion, already constituted in my view an infringement of the freedom of expression. That freedom cannot be made subject to the criterion of confidentiality, otherwise there would no longer be any literature.

In any event the extension of the injunction beyond a few days or weeks (until October 1988) constituted an additional infringement of the freedom of expression, because where the press is concerned a delay in relation to items of current affairs deprives a journalist's article of a large part of its interest. The publication in America and in Europe of more significant memoirs by the heads of secret services has never given rise to a similar prohibition (see in France the books of Mr de Maranches and Mr Marion).

One gets the impression that the extreme severity of Mr Justice Millett's injunction and of the course adopted by the Attorney General was less a question of the duty of confidentiality than the fear of disclosure of certain irregularities carried out by the security service in the pursuit of political rather than intelligence aims.

In this respect there was a violation of the right to receive information, which is the second component of Article 10 (art. 10). To deprive the public of information on the functioning of State organs is to violate a fundamental democratic right.

However, the majority of the Court concerned itself with the first aspect rather than the second.

If the State believes that a publication puts at risk State secrets or national security, there are other procedural means at its disposal. If the State contests a failure to comply with the duty of discretion on the part of a retired civil servant, appropriate procedures are available. In the present case the State did not prosecute Mr Wright.

However, the United Kingdom should, by virtue of the positive obligation imposed by the European Convention, have secured the public's right to be informed. At the hearing the Government did not enlarge upon this issue.

An interim injunction, not subsequently lifted after a short period, is in effect a disguised means of instituting censure or restraint on the freedom of the press (other disguised means used in other countries include prosecution for alleged tax offences). The violation is in my view all the more patent in that it is confirmed by the decision finding a violation as regards the second period.

The majority's reasoning is indeed based on interference with the freedom of expression; but to explain the contrary decision concerning the first period the Court confines itself to stating as follows:

"What they also omit is the fact that in July 1986 *Spycatcher* existed only in manuscript form. It was not then known precisely what the book would contain and, even if the previously-published material furnished some clues in this respect, it might have been expected that the author would seek to say something new. And it was not unreasonable to suppose that where a former senior employee of a security service - an 'insider', such as Mr Wright - proposed to publish, without authorisation, his memoirs, there was at least a risk that they would comprise material the disclosure of which might be detrimental to that service; it has to be borne in mind that in such a context damaging information may be gleaned from an accumulation of what appear at first sight to be unimportant details. What is more, it was improbable in any event that all the contents of the book would raise questions of public concern outweighing the interests of national security." (see paragraph 61 of the judgment)

The contradiction in the way the two periods were viewed is in my opinion the following: on the one hand, a decision imposing a restriction based on mere suppositions or assumptions by the Attorney General and the competent court is regarded as justified; on the other, the publication of the book in the United States and then its partial circulation are said to have rendered the continuation of the injunction unjustified.

But freedom of expression in one country cannot be made subject to whether or not the material in question has been published in another country. In the era of satellite television it is impossible to partition territorially thought and its expression or to restrict the right to information of the inhabitants of a country whose newspapers are subject to a prohibition.

The publication abroad was not truly material to the pretext invoked initially, namely confidentiality, because that had already been breached by Mr Pincher's books and the Granada programmes before Mr Justice Millett's order and because it was in any case very relative. It is possible, with hindsight, to measure the weakness of the Attorney General's argument, although he persisted with the proceedings in 1987 and in 1988. This requirement of confidentiality, which according to him was of major importance, was as it turned out regarded as insignificant by the courts as soon as the information had become known abroad and the book *Spycatcher* reached the United Kingdom clandestinely in the luggage of a few citizens and tourists.

It is true that in the decision on the merits Mr Justice Scott, in keeping with the great liberal and judicial tradition of the United Kingdom, found that the Observer and The Guardian had not infringed the duty of discretion, but he did so belatedly, not until 21 December 1987.

On 13 October 1988 the House of Lords rightly decided that it was not necessary to restrain the Observer and The Guardian from disseminating the contents of the book.

These contradictory decisions of eminent judges show the lack of clarity of the position adopted by the Attorney General. The first decision of the United Kingdom courts remains a surprising one. If the majority of the Court had reasoned on the basis of the "right to receive information" aspect, it would undoubtedly have found a violation for both periods.

It may be recalled that in the *Elliniki Radiophonia Tiléorassi - Anonini Etaireia* case (Case no. 260/89), Mr Lenz, Advocate General at the Court of Justice of the European Communities, made the following observations in his Opinion: (unofficial translation)

"49. The Rules of the Convention must be regarded as an integral part of the Community legal system. Television Directive ... indicates in this connection that the first paragraph of Article 10 (art. 10) of the Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by all the Member States, applied to the broadcasting and distribution of television services, is likewise a specific manifestation in Community law of a more general principle, namely the freedom of expression. This right must therefore be observed by the Community organs.

50. However, it is also clear that the Court of Justice is not required to rule in the first instance on alleged or real violations by the Member States of the human rights secured under that Convention (that is the role of the organs so designated by the European Convention on Human Rights); ..."

The judgment of the Court of Justice of the European Communities, delivered on 18 June 1991, contains the following passage: (unofficial translation)

"41. As regards Article 10 (art. 10) of the European Convention on Human Rights ..., it should be noted in the first place that, as the Court has consistently held,

fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In so doing, the Court draws inspiration from constitutional traditions common to the Member States and from indications provided by the international treaties for the protection of human rights on which the member States have collaborated or of which they are signatories (see, *inter alia*, the judgment of 14 May 1974, *Nold*, Case no. 4/73 ECR [1974] 491, at paragraph 13). In this connection the European Convention on Human Rights is of particular significance (see, *inter alia*, the judgment of 15 May 1986, *Johnston* Case no. 222/84, ECR [1986] 1651, paragraph 18). It follows that, as the Court affirmed in the judgment of 13 July 1989, *Wachauf* (Case no. 5/88, ECR [1989] 2609, at paragraph 19), measures incompatible with the respect for the human rights therein recognised and secured are not permissible in the Community."

The eminent judge Lord Bridge appositely observed in the House of Lords in his dissenting opinion:

"Freedom of speech is always the first casualty under a totalitarian regime. Such a regime cannot afford to allow the free circulation of information and ideas among its citizens. Censorship is the indispensable tool to regulate what the public may and what they may not know. The present attempt to insulate the public in this country from information which is freely available elsewhere is a significant step down that very dangerous road. The maintenance of the ban, as more and more copies of the book *Spycatcher* enter this country and circulate here, will seem more and more ridiculous. If the Government are determined to fight to maintain the ban to the end, they will face inevitable condemnation and humiliation by the European Court of Human Rights in Strasbourg. Long before that they will have been condemned at the bar of public opinion in the free world." ([1987] 1 Weekly Law Reports 1286F)

The same line of thought is reflected in the words of Mr Redwood, a United Kingdom Secretary of State, when he gave vent to his anxiety concerning the "current flood of restrictive directives from the EEC which threatens the freedom of expression" (*Le Monde*, 3 November 1991).

The protection afforded by Article 10 (art. 10) is therefore essential; this has always been the approach of the European Court in its judgments: *Sunday Times I*, *Barthold*, *Lingens*.

The defence of democracy cannot be achieved without the freedom of the press. The countries of Eastern Europe which have thrown off the shackles of totalitarian rule have well understood this. The European Court through all its earlier judgments has shown its attachment to the protection of freedom of expression and the priority which this is acknowledged to have.

To remain consistent with its case-law it should, in my view, have found a violation for both periods.

The Council of Europe has together with the organs of the European Convention a crucial task: this is to introduce true freedom of expression in all its forms and at the same time guarantee the public's right to receive information. This acquired democratic right must be preserved if we wish to protect freedom of thought!

PARTLY DISSENTING OPINION OF JUDGE WALSH

1. I agree with the majority of the Court that in respect of the period 30 July 1987 to 13 October 1988 there was a violation of Article 10 (art. 10) of the Convention by reason of the injunctions imposed on the applicants in respect of that period.

2. Unlike the majority of the Court I am of opinion that there was also a breach of Article 10 (art. 10) in respect of the period 11 July 1986 to 30 July 1987.

3. Freedom of the press is not totally unrestricted. The press in its pursuit of news is not free to counsel or to procure the commission of acts which are illegal, and may be restrained in appropriate cases from publishing material so gained, or may be liable in damages or may suffer both restraint and damages. In so far as breach of confidentiality amounts to an illegality either on the criminal side or on the civil side the newspapers will be so liable in respect of matters the revelation of which they have counselled or procured.

4. Their liability is not necessarily the same when their news gathering has benefited from windfall revelations which may have resulted from some breach of confidence for which they have no responsibility. It is a legitimate activity of the press to follow up such news and to publish the results of their inquiries provided in so doing they do not come in conflict with, say, national security. However that cannot be invoked to gain a restriction simply by an expression of opinion on the part of the authorities as was the case here. The issues of breach of confidence and national security were joined by the Government in the present case to the extent that the lines between them were blurred in the initial application for an injunction. The truth or falsity of the "revelations" was not put in issue. It appears to me that for the purposes of Article 10 (art. 10) of the Convention the publication of "revelations" cannot be restrained without at least an allegation of their truth by the moving party. If, as was done in the Australian hearing, the Government simply "admits the truth" for the purposes of the case the application to restrain becomes moot. Sufficiency of the allegations by Mr Wright had already become public to enable the truth or otherwise of them to be ascertained. The identification of Mr Wright as the source did not affect that issue.

Even if the truth of the principal allegations is to be assumed, namely that the Security Service agents had indulged in illegal activities, that had already been publicly aired in a manner which left no doubt that Mr Wright, by his writings, conversations and television interview, was at least one source of the allegations. The applicant newspapers campaigned for an investigation of the allegations and their subsequent conduct was in furtherance of that campaign. They were not engaged directly or indirectly in debriefing Mr Wright on other knowledge he had gained as a secret

service agent. There was no indication that the newspapers were intent on publishing any material other than what was directly related to information already published and which it had not been sought to restrain. The "revelation" that Mr Wright was personally involved in the commission of the alleged illegal activities could scarcely be regarded as a restrainable piece of information in the light of all that was already known.

5. In view of the fact that the claim of confidentiality made in support of the initial application for a restraining order never made clear that a true breach of confidentiality was imminent, namely that true facts were threatened with disclosure, the Attorney General's position, which it was sought to protect, was never really made known at that stage. In my opinion the circumstances were insufficient to bring the case within the area of restrictions permitted by Article 10 para. 2 (art. 10-2) of the Convention.

It is clear that the matters the applicants had wished to deal with were of great interest to the public and perhaps even of concern. The public interest invoked by the Government appears to be equated with Government policy. That policy may very well justify, in the Government's view, making every effort to stem leakages from the Security Service or indeed in the interests of that service to take no action at all to deal with the allegations or indeed to pursue Mr Wright in any way available. These are policy matters and are not grounds for invoking the restrictions permitted by Article 10 para. 2 (art. 10-2) . Equally it may be understandable that, as was evident, the main objective of the proceedings was to act as a deterrent to those who in the future might be tempted to reveal secrets gained from their work as agents or members of the Security Service. That, however, is not a consideration which can justify the application of the restrictions on the press permitted by Article 10 para. 2 (art. 10-2). The relief sought against the applicants, as distinct from Mr Wright, has not been shown to have been, in all the circumstances, necessary in the democratic society which is the United Kingdom.

**PARTLY DISSENTING OPINION OF JUDGE DE MEYER
(concerning prior restraint), JOINED BY JUDGES PETTITI,
RUSSO, FOIGHEL AND BIGI**

I cannot endorse the Court's reasoning concerning prior restraint upon publications. Nor can I agree with its finding that, in the present case, the applicants' right to freedom of expression was not violated before the end of July 1987.

In my view, it was violated not only after that date and until the case was concluded in October 1988, but already from the very beginning of the proceedings in June 1986, when the Attorney General set about seeking injunctions against them.

My reasons for so finding are simple.

I firmly believe that "the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraint"*: in a free and democratic society there can be no room, in time of peace, for restrictions of that kind, and particularly not if these are resorted to, as they were in the present case, for "governmental suppression of embarrassing information"** or ideas.

Of course, those who publish any material which a pressing social need required should remain unpublished may subsequently be held liable in court, as may those acting in breach of a duty of confidentiality. They may be prosecuted if and in so far as this is prescribed by penal law, and they may in any case be sued for compensation if damage has been caused. They may also be subject to other sanctions provided for by law, including, as the case may be, confiscation and destruction of the material in question and forfeiture of the profit obtained.

Under no circumstances, however, can prior restraint, even in the form of judicial injunctions, either temporary or permanent, be accepted, except in what the Convention describes as a "time of war or other public emergency threatening the life of the nation" and, even then, only "to the extent strictly required by the exigencies of the situation"***.

* Justice Black, joined by Justice Douglas, in the case, very similar to the present one, of the Pentagon Papers, *New York Times v. U.S.* and *U.S. v. Washington Post* (1971), 403 U.S. 713, at 717. Although they were there used in the context of the Constitution of the United States of America, these words perfectly express the general principle to be applied in this field.

** Justice Douglas, joined by Justice Black, in the same case, at 723-724.

*** Article 15 (art. 15) of the Convention.

SEPARATE OPINION OF JUDGE DE MEYER (concerning
domestic remedies), JOINED BY JUDGE PETTITI

I cannot subscribe to the third sub-paragraph of paragraph 76 of this judgment.

The reasons given in the second sub-paragraph suffice to conclude that there was, in the present case, no violation of the right of the applicants to an "effective remedy before a national authority".

The question whether a certain treaty is, or is not, "incorporated into domestic law" may be of some interest as regards other kinds of treaties. It has no relevance when fundamental rights are concerned: these are of such a nature that it cannot be necessary to have them formally "incorporated into domestic law".

As I stated already on another occasion, the object and purpose of the European Convention on Human Rights was not to create, but to recognise rights which must be respected and protected even in the absence of any instrument of positive law*. It has to be accepted that, everywhere in Europe, these rights "bind the legislature, the executive and the judiciary, as directly applicable law"** and as "supreme law of the land, ... anything in the constitution or laws of any State to the contrary notwithstanding"***.

* See my opinion concerning the Belilos case, Series A no. 132, p. 36. See also Article 1 (art. 1) of the Convention, particularly in the French text.

** See Article 1, section 3, of the Basic Law of the Federal Republic of Germany.

*** See Article VI, section 2, of the Constitution of the United States of America.

SEPARATE OPINION OF JUDGE VALTICOS

(Translation)

While in full agreement with the foregoing judgment, I wish to comment on a passage which appears at paragraph 76 of the text. It is recalled therein, at the third sub-paragraph, that "the Court has held on several occasions that there is no obligation to incorporate the Convention into domestic law". This statement is correct, but remains somewhat over-succinct.

It cannot of course be disputed that under international law the strict obligation incumbent on States which ratify a convention concerning their legislation and their practice is to give effect to the convention at national level and that this does not necessarily mean that the actual terms of the convention must as such be transposed into the domestic legal system. What is essential is that the convention is, in one way or another, complied with. All this is beyond question and indeed elementary.

There is however in this connection a tendency towards over-simplification which leads to confusion. The starting point is that the formal effects which the ratification of a convention entails at domestic level naturally depend on the national constitutional system or practice and that, in this respect, under the said system (or practice) in several countries (moreover an increasing number of them) that ratification entails the incorporation of the ratified text into domestic law, while in others the two orders (international and municipal) remain distinct, even though sometimes the ratifying statute expressly enacts this incorporation. It is also worth noting that such incorporation is moreover effective, at least directly, only if the convention provisions are - according to the generally accepted expression - self-executing, in other words capable of execution without implementation by more specific (national) rules. All this is well-known and calls to mind old academic quarrels, happily mostly forgotten, and I trust that I shall be forgiven for recalling these self-evident truths.

I consider nevertheless that it is necessary to return, at least indirectly, to this question here because I wish to draw the following conclusion: yes, the Court is right when it affirms once again that States are not bound to incorporate the actual terms of the Convention into their national legal system. This statement should however be supplemented by adding: "but they are of course under a duty to give it effect". Some will say that this is only to state the obvious. Indeed it is, but the affirmation should be further qualified by: "and the obligation to give it effect is often best fulfilled where the terms of the Convention are transposed into the domestic legal system". This has nothing to do with national constitutional systems or with the old "monist" v. "dualist" quarrels. What is suggested is that the States whose constitutional system does not automatically effect such incorporation should carry it out by an express measure, whether legislative or otherwise,

following the ratification, accompanying it, if necessary, by provisions intended either to implement the provisions of a general nature or to adapt the national system to the new standards. Who would dispute that the national courts, whose attention would thus be drawn to the very terms of the Convention, which will have become national law, would find in the provisions, even the general ones, of the Convention, elements and criteria rendering their full application easier, and this may be the case even where the Government concerned consider that the existing legislation or case-law already gives effect to the Convention standards?

Although such a measure is not obligatory, it is nevertheless highly desirable with a view to ensuring not only better knowledge of the Convention but certainly also a more complete implementation thereof. This is the general conclusion which I have arrived at after more than thirty years of practice in the sphere of application of international conventions concerning human rights. It is, in the instant case, the necessary addition to the principle briefly set out by the Court.

PARTLY DISSENTING OPINION OF JUDGE MARTENS

A. Introduction

1. Like the majority of the Court, I consider that the interim injunctions, as maintained by Mr Justice Millett in his judgment of 11 July 1986, constituted an interference with O.G.'s exercise of their freedom of expression, within the meaning of paragraph 1 of Article 10 (art. 10-1). Unlike the majority, however, I find myself unable to accept that this interference was justified under paragraph 2 of that Article (art. 10-2) even during the period from 11 July 1986 to 30 July 1987.

More specifically, I am not satisfied that the requirement of necessity was met.

B. Particular features of the present case

2. The interim injunctions sought by the Attorney General against O.G. formed part of the legal campaign on which the British Government embarked when they learned that Mr Wright intended to publish his memoirs. This campaign started with the Attorney General's claim in the Australian courts for an injunction to restrain publication of the book. It continued when, after publishing short articles giving details of some of the contents of the book, O.G. refused to give undertakings that were acceptable to the Attorney General: he then sought permanent injunctions against any publication by O.G. of Spycatcher material and, within the ambit of these proceedings, interim injunctions to the same effect. Such interim injunctions were granted *ex parte* on 27 June 1986 and then continued, with some modifications, by Mr Justice Millett in his aforementioned judgment.

3. In legal terms, this campaign was based on the proposition that the disclosure by Mr Wright of information derived by him from his work for the Security Service would constitute a breach of a duty of confidentiality, as would disclosure by O.G., since they had obtained the information knowing that it originated from that breach. However, the Government's principal concern was - as Mr Justice Millett put it - "not with what Mr Wright says, but with the fact that it is a former senior officer of the Security Service who says it". Accordingly, their campaign was mainly designed to secure implementation of the idea that members of the Security Service - to quote the same judge - "simply cannot be allowed to write their memoirs". The appearance of confidentiality being essential to the effective operation of the Security Service, the damage caused by the news that one of its former senior members was contemplating publishing his memoirs could - to borrow again from Mr Justice Millett's judgment - "be undone

only if he was swiftly and effectively stopped, and seen to be stopped" (emphasis added). This applied to all indirect publication as well.

4. O.G., however, wished to be free to publish information which might come into their possession, even if it derived directly or indirectly from Mr Wright, in so far as it disclosed misconduct or unlawful activities on the part of members of the Security Service. Like Mr Wright in the Australian proceedings, they claimed that it was in the public interest that evidence of such misconduct should be published, part of such evidence being that the allegations thereof were made by a former senior officer of the service on the basis of information acquired by him whilst employed by it.

5.1 It follows from paragraph 4 that the impugned interim injunctions do constitute what is commonly called a "prior restraint".

5.2 When giving judgment on the appeal from Mr Justice Millett's decision, the Master of the Rolls started by saying, somewhat deprecatingly: "'Prior Restraint' are two of the most emotive words in the media vocabulary." There is, however, no ground for deprecating the emotion these words tend to generate, because they designate, especially with regard to the media, what undoubtedly is, after censorship, the most serious form of interference with a freedom which, as this Court has rightly emphasised time and again, constitutes one of the essential foundations of a democratic society (see, as the most recent example, the Oberschlick judgment of 23 May 1991, Series A no. 204, paras. 57 et seq.). In the present case the prior restraint concerned, moreover, possible comment by two "responsible newspapers" (I quote again from the Master of the Rolls) "in the context of public debate on a political question of general interest" (borrowed from paragraph 60 of the Oberschlick judgment). Its consequences were all the more dramatic since, under the doctrine of contempt of court as understood (apparently for the first time) by the Court of Appeal in the Independent case, it gagged not only O.G. but all media within the jurisdiction of the English courts.

C. The Court's task when reviewing necessity

6. In its Handyside judgment of 7 December 1976 (Series A no. 24, pp. 23-24, para. 50) the Court had already made it clear that when reviewing the "necessity" of an interference it had to decide, on the basis of the different data available, "whether the reasons given by the national authorities to justify the actual measures of 'interference' they take are relevant and sufficient under Article 10 para. 2 (art. 10-2)" (idem: the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 38, para. 62, and the Barthold judgment of 25 March 1985, Series A no. 90, p. 25, para. 55). Recently, in paragraph 60 of its aforementioned Oberschlick judgment, the Court specified that this test implies that it has to satisfy itself that the national authorities "did apply standards which were in conformity with

these principles" - i.e. the principles to be derived from Article 10 (art. 10) - "and, moreover, that in doing so they based themselves on an acceptable assessment of the relevant facts".

D. Application of this test

7. Accordingly, in order to determine whether the prior restraint can be held justified it is necessary to examine very carefully: (a) whether, in deciding to impose this exceptional measure, the national authorities did apply standards which were in conformity with the principles to be derived from Article 10 (art. 10); and (b) whether, in doing so, they based themselves on an acceptable assessment of the relevant facts.

In my opinion, such examination cannot but lead to the conclusion that both limbs of this question must be answered in the negative. I will explain why.

E. The standards used

8. I start with the first limb: what standards were applied (paragraphs 9 and 10) and are they in conformity with the principles to be derived from Article 10 (art. 10) (paragraph 11)? I note that, in addressing these two questions, it is sufficient to analyse the judgment of Mr Justice Millett, because in the subsequent stages of the interlocutory proceedings not only was his decision held to be justified, but also no fundamental criticism was levelled as to the legal principles on which he had based it.

9.1 Mr Justice Millett started from the assumption that there was at best a conflict of two legitimate public interests: on the one hand, the (incontestable) interest the public has in the maintenance of confidentiality within any organisation as a condition for its efficiency and, on the other, the (possible) interest of the public in being informed of unlawful acts or other misconduct. He held that the applications to discharge the *ex parte* injunctions could be granted only if O.G. had satisfied him that the latter interest existed and outweighed the former.

9.2 Leaving aside (as immaterial for the present purposes) the complication that interim injunctions had already been granted *ex parte* so that it was O.G. who had to apply for their discharge, the conclusion must be that the standard used by the national judge for deciding whether or not to impose a prior restraint was: an interim injunction sought for the purpose of preserving confidentiality should be granted unless the defendant satisfies the court that (a) disclosure is in the public interest and (b) this interest outweighs the interest in preserving confidentiality.

10.1 Mr Justice Millett left open the question whether the standard he used was an exception to or an application of the American Cyanamid principles (see, for these principles, paragraph 10 of the Court's judgment),

but held that he was satisfied that pecuniary compensation to either party would be wholly inappropriate. He continued by saying that, "in resolving the conflict" of interests, one of the particular facts he had to take into account was that "a refusal of injunctive relief may cause irreparable harm and effectively deprive the plaintiff of his right".

10.2 In my opinion, one can only infer from these and similar passages that the judge did apply the American Cyanamid principles, at least to the extent of tacitly assuming that the material before him did not disclose that the Attorney General did not have any real prospect of succeeding in his claim for a permanent injunction.

11.1 Are these standards in conformity with the principles to be derived from Article 10 (art. 10)? I do not think so.

11.2 I take first Mr Justice Millett's starting-point, namely that there was at best a conflict between two legitimate public interests, one in the maintenance of confidentiality, the other in receiving information about misconduct or impropriety. Evidently, for him these two interests had, in principle, the same weight. This is, however, incompatible with Article 10 (art. 10). Under that provision the interest in freely receiving information clearly in principle outweighs the interest in "preventing the disclosure of information received in confidence": the latter interest is not in itself sufficient to justify an interference with the right to freedom of expression, but does so only if and in so far as the interference is "necessary in a democratic society". Similarly, under Article 10 (art. 10) it is not for the press, if threatened by a prior restraint, to ward off the interference by satisfying the court that (a) there is a public interest in imparting and receiving the information with regard to which the injunction is sought, and (b) this interest outweighs the interest in preserving the confidentiality of that information. That is to turn things topsy-turvy: under Article 10 (art. 10), freedom of the press is the rule and this implies that what has to be justified is the interference; therefore it is for the party seeking the restraint - in this case the Attorney General - to satisfy the court that the requirements of paragraph 2 are met, i.e. that the restraint can be said to be "necessary in a democratic society" (in the rather strict meaning these words have according to this Court's settled case-law) for the preservation of confidentiality.

11.3 Thus, the standard used unduly tipped the balance in advance in favour of the Attorney General, the party who was seeking to restrict freedom of expression. This is all the more serious because, when applying that standard, Mr Justice Millett - following the American Cyanamid principles as he did (see paragraph 10.2 above) - again favoured the Attorney General in a way which is incompatible with the principles to be derived from Article 10 (art. 10).

11.4 When applying the above standard, Mr Justice Millett was, as he pointed out, taking into account "that this is an interlocutory application and

not the trial". Yet, without more ado, he also took into account that refusal of injunctive relief might "deprive the plaintiff of his right". In particular, he did so without going explicitly into the question whether the plaintiff in fact had any right and without inquiring what the Attorney General's chances were of obtaining permanent injunctions at the trial. As I have already said in paragraph 10.2 above, it must be inferred that the judge confined himself to ascertaining that, on the material before him, it could not be said that on the face of it the Attorney General's claim did not have any real chance of success.

11.5 When assessing whether this approach is in conformity with the principles to be derived from Article 10 (art. 10), it is important to realise that the interim injunction sought by the Attorney General in the interlocutory proceedings was merely a derivative from the permanent injunction sought by him in the main proceedings. I say "merely a derivative" because the interim injunction did not serve an independent purpose, but was intended solely to prevent (further) indirect publication until the court had had the opportunity to take a final decision as to whether indirect publication would be allowed or not.

11.6 It is also to be noted that under Article 10 (art. 10) both the interim and the permanent injunction could be granted only if they could be said to be "necessary in a democratic society". Just as the interim injunction is merely a derivative from the permanent one, so the necessity requirement for granting the former is but a derivative from that for granting the latter. Accordingly, the application for the interlocutory prior restraint could be granted only if the court were satisfied at that stage that the Attorney General's claim in the main proceedings would probably meet the requirement of necessity. It could hold the interlocutory injunction to be "necessary", within the meaning of Article 10 para. 2 (art. 10-2), only if it were satisfied that the claim for a permanent injunction would probably be accepted. If that was open to serious doubts or even merely uncertain, the interference could hardly be qualified as necessary: this, as the Court has repeatedly and rightly stressed, is a rather strict requirement, especially where the freedom of expression of the press in matters of public interest is at stake.

11.7 It follows that: (a) to comply with the principles to be derived from Article 10 (art. 10), Mr Justice Millett should have imposed the interim prior restraint only if the Attorney General had satisfied him that the claim for a permanent injunction would probably succeed; and (b) by confining himself to examining whether it was evident that that claim did not have any real chance of success, the judge in fact applied a standard which was at variance with those principles.

F. The assessment of the facts

12.1 I now turn to the second limb of the question outlined in paragraph 7 above: was Mr Justice Millett's decision based on an acceptable assessment of the relevant facts? And I note that the expression "the relevant facts" implies (inter alia) reviewing whether facts that should have been taken into account under Article 10 (art. 10) were indeed duly considered. In this respect, I recall that the injunctions sought by the Attorney General against O.G. formed part of the legal campaign on which the British Government embarked when they learned that Mr Wright intended to publish his memoirs. Within the ambit of this campaign the relationship between the English and the Australian proceedings was similar to that which existed between the interlocutory and the main proceedings in England, as outlined in paragraphs 11.5 and 11.6 above: just as the Attorney General started the interim proceedings in order to preserve his position in his claim for a permanent injunction restraining all indirect publication of Spycatcher material, so he made that claim in order to preserve his position in the Australian case, where he asked for an injunction restraining publication of the book itself.

It follows that the probable outcome of the English proceedings (the relevance of which has been discussed in paragraphs 11.4 - 11.7 above) would depend to a large extent on that of the Australian proceedings: would the Attorney General's endeavours to stop the imminent publication of the memoirs be likely to succeed? If their success would have been open to serious doubts, the same would have applied to the prospects of his claim for a permanent injunction against O.G. If, at the moment when the English courts would have to decide whether or not to grant that claim, his action concerning direct publication had already failed or was likely to do so shortly, those courts would hardly be in a position to hold that a permanent injunction against indirect publication should nevertheless be regarded as necessary.

12.2 These considerations show that Mr Justice Millett should have asked himself whether it was likely that the Government would attain what he - after a judicious analysis of the allegations made and the evidence submitted by the Attorney General - rightly considered as their goal, namely to stop swiftly and effectively Mr Wright's attempts to publish memoirs which should not even have been written (see paragraph 3 above). The learned judge failed, however, to do so and therefore cannot be said to have based his decision on an acceptable assessment of the relevant facts (see paragraph 6 above).

12.3 There is a second and, to my mind, still more important ground for so holding, namely that, if the question whether the Government would succeed in effectively keeping Spycatcher from the public had been considered, it should have been answered in the negative.

As the Government had been advised, proceedings to restrain publication of the book in the United States of America would fail (see paragraph 28 of the judgment). It was likely (and the events in 1987 clearly confirmed this) that Mr Wright had been similarly advised. It does not appear that Mr Justice Millett considered the repercussions of these facts and yet, within the context of the relationship between the English and the Australian proceedings, they are of decisive importance. The impossibility of preventing publication in the United States highlights that in this "age of information" information and ideas just cannot be stopped at frontiers any longer. Article 10 para. 1 (art. 10-1) has explicitly drawn the legal consequences of this situation. Accordingly, under Article 10 (art. 10) the impossibility of restraining publication in the United States perforce implied that restraint in Australia could not be held to be "necessary", within the meaning of paragraph 2. It is immaterial whether the Australian courts would have drawn this conclusion when confronted with that impossibility. For it is the conclusion which a court in a member State should have drawn and that is what should have been deemed decisive in the context of the dispute between O.G. and the United Kingdom.

These considerations suggest that one of the respects in which I differ from the majority of the Court comes down to this: whereas for them the fact that the book had been published in the United States in the meantime is the sole decisive reason for holding that prior restraint on indirect publication in England was thenceforth no longer justified, for me the fact that the book could be legally published in the United States made it, even at the time when the Attorney General introduced his breach of confidence actions, so unlikely that Mr Wright could effectively be stopped that the interim injunction should never have been granted. But Mr Justice Millett did not take this factor into account, just as he did not consider what chances the Attorney General had of winning the Australian case.

G. Conclusion

13. To sum up: in my opinion, Mr Justice Millett's decision was based on standards that were not in conformity with the principles to be derived from Article 10 (art. 10) and also on a factual assessment which, in the light of this provision, is incomplete to a decisive degree. I therefore find myself unable to accept that, even during the period from 11 July 1986 to 30 July 1987, the interference was "necessary" under paragraph 2 of that Article (art. 10-2).

PARTLY DISSENTING OPINION OF JUDGE PEKKANEN

I regret that I am unable to agree with the majority of the Court that there was no violation of Article 10 (art. 10) of the Convention on account of the temporary injunctions binding on the applicants in the period from 11 July 1986 to 30 July 1987.

I agree with the majority that Article 10 (art. 10) does not prohibit the imposition on the press of prior restraints, as such, on the publication of certain news or information. However, taking into account the vital importance in a democratic society of freedom of expression and freedom of the press, the State's margin of appreciation in these cases is very narrow indeed. The use of prior restraints must be based, in my opinion, on exceptionally relevant and weighty reasons which clearly outweigh the public's legitimate interest in receiving news and information without hindrance. This leads me to the general conclusion that prior restraints can be imposed on the press only in very rare and exceptional circumstances and usually only for very short periods of time.

The aim of the temporary injunctions in this instance was to preserve the status quo during judicial proceedings. As such, this is a legitimate aim. But was there a pressing social need for these measures in a democratic society and were they proportionate to the aims pursued?

First of all, I would stress that in today's world news and information travel very quickly and easily from country to country and that it is practically impossible to stop this. As the present case shows, temporary injunctions imposed on the Observer and Guardian applicants - which were binding on all the British media through the operation of the doctrine of the contempt of court - could not prevent the flow of the information in question from abroad. Prior restraint was, therefore, not an effective means of achieving the aim of preserving the status quo. Furthermore, before the temporary injunctions were granted, the confidentiality of the material concerned had to a large extent already been destroyed by previous publications and television interviews. Accordingly, there was no need for the restrictions on this occasion.

These considerations alone show, in my opinion, that in the instant case there was no pressing social need for so drastic a measure as prohibiting the press from disseminating information.

PARTLY DISSENTING OPINION OF JUDGE MORENILLA

1. I agree with the majority of the Court that the interlocutory injunctions imposed on the Observer and Guardian applicants ("O.G.") by Mr Justice Millett on 11 July 1986 ("the Millett injunctions") forbidding the publication of information obtained by Mr Peter Wright in his capacity as a member of the British Security Service - which injunctions extended to all the British media, including The Sunday Times, by virtue of the law of contempt of court and remained in force until 13 October 1988 - constituted an interference with O.G.'s freedom of expression and their right to hold opinions and to receive and impart information and ideas, guaranteed by Article 10 para. 1 (art. 10-1) of the Convention.

I also agree, but not without some hesitation, that this interference was "prescribed by law", as this expression is understood in the case-law of our Court (see the Sunday Times judgment of 26 April 1979, Series A no. 30, pp. 30-31, paras. 47-49): in accordance with the common-law system, it was based on judicial precedents and they were adequately accessible and the result of their application sufficiently foreseeable. Again, I share the majority's view that the injunctions were designed to protect the position of the Attorney General as a litigant pending the trial of his breach of confidence actions against O.G. and also served the purpose of protecting national security by preventing further dissemination of confidential information on the operation of the Security Service. Both of these aims are legitimate under paragraph 2 of Article 10 (art. 10-2).

I must, however, record my disagreement on the key issue, namely the necessity of such restrictions in a democratic society. At no time, in my opinion, were these temporary injunctions justified by a "pressing social need" or proportionate to any legitimate aims pursued. I must, therefore, dissent from the majority's conclusion regarding the period from 11 July 1986 to 30 July 1987.

2. In my view, this central issue should not have been separated into two periods, as was done by the Commission, "for the sake of clarity", and the majority of the Court. All the decisions, from that of Mr Justice Millett to that of the House of Lords in 1987, were part of the same interlocutory proceedings and O.G. were subject to essentially the same restrictions throughout the period from July 1986 to October 1988. Separating it into two has led to the somewhat inconsistent outcome of finding those restrictions to be partly in accordance with and partly in violation of the Convention.

On 29 April 1987 O.G. applied for the discharge of the Millett injunctions, notably because of reports that had appeared in three other English newspapers (see paragraphs 22-23 of the judgment). On 12 July 1987, a date intended to coincide with that of the publication of *Spycatcher* in the United States of America, The Sunday Times published a first extract

from the book (see paragraphs 27-28 of the judgment). Nevertheless, the House of Lords decided to maintain the injunctions and, as a result of the law of contempt of court, they bound all the British media, including The Sunday Times.

The publication of *Spycatcher* in the United States and the world-wide diffusion of Mr Wright's disclosures on the activities of MI5 are not "relevant", in my opinion, either to O.G.'s claim under Article 10 (art. 10) or to the breach of confidentiality that the Government imputed to them: they merely confirmed that to attempt to prevent the dissemination in English-speaking countries of information of general interest by imposing a judicial restraint on the British media was neither realistic nor effective.

3. The major principles emerging from the Court's case-law on Article 10 (art. 10) - with which principles I fully agree - are conveniently summarised in paragraph 59 of the present judgment and I do not need to elaborate on that summary here.

The Government have recalled the Court's observation, in its *Markt intern Verlag GmbH and Klaus Beermann* judgment of 20 November 1989 (Series A no. 165, p. 21, para. 37), that it should not substitute its own evaluation for that of the national courts where the latter, on reasonable grounds, have considered restrictions to be necessary. They have also submitted that the margin of appreciation to be afforded to the national authorities, in assessing whether the protection of national security demands the imposition of temporary restraints on publications, is a wide one.

The Court's observations in the *Markt intern* case, which related to the publication in a specialised sector of the press of information of a commercial nature, do not in any way establish an exception to its supervisory jurisdiction, which is described in paragraph 59 (d) of the present judgment.

In the Convention system, the Court has been empowered to draw the line between the competence of the national courts and its own competence, while at the same time maintaining their respective responsibilities to secure the guaranteed rights and freedoms, according to Articles 1 and 19 (art. 1, art. 19). It is true that the State's margin of appreciation is wider when it is a question of protecting national security than when it is a question of maintaining the authority of the judiciary by safeguarding the rights of the litigants (see the above-mentioned *Sunday Times* judgment, Series A no. 30, p. 36, para. 59, and the *Leander* judgment of 26 March 1987, Series A no. 116, p. 25, para. 59). However, the margin of appreciation concept must always be applied, taking into account the circumstances of each case, on the basis of a coherent interpretation of Article 10 (art. 10) in accordance with the European case-law and certainly not in a manner that could destroy the substance of freedom of expression.

4. The overriding importance of freedom of expression, the vital role of the press in a democratic society and the right of the public to receive

information on matters of general concern, all of which factors have been repeatedly emphasized in the case-law of this Court, required in the present case the application of a very strict test of necessity. When seeking to justify the restrictions imposed on O.G. on the grounds of the interests of national security and of preserving the Attorney General's rights until the trial, the Government have, in my opinion, failed to "establish convincingly" (see paragraph 59 (a) of the present judgment) that such a test was satisfied.

A. The interests-of-national-security issue

5. Like the members of the majority of the Commission, Mr Frowein, Mr Busuttil and Mr Weitzel, I am of the opinion that the primary concern of the English courts in the present case was not the protection of national security but the protection of confidentiality. The danger for national security was alleged indirectly, as resulting from the loss of confidentiality and the impairment of the efficiency and reliability of the Security Service. Thus, Mr Justice Millett said in his judgment (transcript, p. 11E-F): "It is obvious that a Security Service must be seen to be leak-proof. The appearance of confidentiality is essential for its proper functioning. Its members simply cannot be allowed to write their memoirs."

The interlocutory injunctions had the consequences that (1) a restraint was imposed without a full hearing of the plaintiff's arguments; and (2) the ban extended to all the media by operation of the common-law doctrine of criminal contempt of court. And, in fact, contempt of court proceedings were instituted against The Independent, The London Evening Standard, the London Daily News and The Sunday Times (see paragraphs 22 and 27 of the judgment).

The national judges were well aware of the gravity of the measure. Mr Justice Millett said in his judgment (transcript, p. 6B-C) that "prior restraint of publication is a serious interference with the freedom of the Press and the important constitutional right to freedom of speech". In the Court of Appeal on 25 July 1986, Sir John Donaldson began his judgment (transcript, p. 3A) by stating that "'Prior Restraint' are two of the most emotive words in the media vocabulary. Accordingly The Guardian and the Observer reacted swiftly and forcefully to news that Mr Justice MacPherson had granted an ex parte injunction on 27 June 1986 ...".

6. In fact, distrust for these provisional restraints on the press is long-established in the common-law tradition. Blackstone wrote in 1765 in his "Commentaries on the Law of England" a sentence which it has become obligatory to quote: "The liberty of the Press is indeed essential to the nature of a free State: but this consists in laying no previous restraints upon publications and not in freedom from censure for criminal matter when published."

The United States case-law cited by "Article 19", the International Centre against Censorship (see paragraph 6 of the present judgment), has consistently held that the principal purpose of the First Amendment's guarantee is to prevent prior restraints. With regard to the national-security aim the United States Supreme Court declared in *Near v. Minnesota* (283 U.S./718) that: "The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right."

The other leading decisions of that Court, such as those in *New York Times Co. Ltd v. the U.S.*, 403 U.S./713 (1971) (the Pentagon Papers case), *Landmark Communications Inc. v. Virginia*, 425 U.S./829 (1978) (the Landmark case), *Nebraska Association v. Stuart*, 427 U.S./ 593 (1976) and *U.S. v. The Progressive*, 486 F. supp. 990 (1979) (the Hydrogen Bomb case), have consistently required that very strict conditions ("all but totally absolute") must be satisfied before prior restraints can be imposed on the publication of information on matters related to national security. In the words of the Nebraska judgment, "the thread running through all these cases is that prior restraints on speech or publication are the most serious and least tolerable infringement on the First Amendment rights ... A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraints 'freeze' it, at least for a time." Justice Brennan, concurring with the judgment, stated "although variously expressed it was evident that even the exception was to be construed very, very narrowly: when disclosure 'will surely result in direct, immediate and irreparable damage to our nation or its people'".

7. While sharing the view of the majority expressed in paragraph 60 of the present judgment, I believe that restrictions on freedom of expression such as those imposed on O.G. allegedly to protect national security are very far from fulfilling these standards. The Government have not shown the "direct, immediate and irreparable damage" to the security of the United Kingdom that was or would have been occasioned by the articles published by O.G. or from the disclosures which it was feared at the time that Mr Wright might make. Mr Justice Millett said in his judgment (transcript, p. 10F): "It is clear from those passages [in Sir Robert Armstrong's affidavits] that the true nature of the Attorney General's objection is not to the fresh dissemination of allegations about past activities of the Security Service of the kind outlined in the recent articles published by the defendants. They are ancient history and have been the subject of widespread previous publicity."

The "appearance of confidentiality" may be "essential to the effective operation of the Security Service" - as it is to other public services - but, for the purposes of Article 10 para. 2 (art. 10-2) of the Convention, it does not,

in my opinion, of itself justify the imposition, on the grounds of protecting national security, of a prior restraint that impairs freedom of the press and the right of the public to be properly informed. Dissemination of the information in question could be restricted "only if it appeared absolutely certain" that its diffusion would have the adverse consequence legitimately feared by the State (see, *mutatis mutandis*, the above-mentioned Sunday Times judgment, Series A no. 30, pp. 41-42, para. 66).

The two Law Lords who dissented from the decision of the House of Lords of 30 July 1987 expressed their views on this point. Lord Bridge of Harwich said that "freedom of speech is always the first casualty under a totalitarian regime. Such a regime cannot afford to allow the free circulation of information and ideas among its citizens. Censorship is the indispensable tool to regulate what the public may and what they may not know. The present attempt to insulate the public in this country from information which is freely available elsewhere is a significant step down that very dangerous road" (*Attorney General v. Guardian Newspapers Ltd* [1987] 1 Weekly Law Reports 1286F). Lord Oliver of Aylmerton stated that "to attempt, even temporarily, to create a sort of judicial cordon sanitaire against the infection from abroad of public comment and discussion is not only, as I believe, certain to be ineffective but involves taking the first steps upon a very perilous path" (*ibid.*, 1321D).

8. When considering whether the injunctions imposed on O.G. by the national authorities were necessary for and proportionate to the aim of protecting national security, I see the following circumstances as militating against the necessity of so serious a restriction.

(a) The Government had neither indicated precisely what information in the articles published by O.G. imperilled British security operations nor demonstrated the imminent or substantial danger for national security they created.

(b) The articles, which appeared on the inside pages of the newspapers, were short and fair reports on the issues in the Australian proceedings. The allegations about the activities of MI5 had, according to Mr Justice Scott (*Attorney General v. Guardian Newspapers Ltd* (No. 2) [1990] 1 Appeal Cases 128-138), been divulged before in twelve books and three television programmes, and especially in two books written by Mr Chapman Pincher in 1981 and 1984 and in a television interview with Mr Wright himself that had been publicly announced in advance. And, as the Vice-Chancellor, Sir Nicolas Browne-Wilkinson, stated (*Attorney General v. Guardian Newspapers Ltd* [1987] 1 Weekly Law Reports 1264C), "in the present case, it is not suggested, nor could it be, that The Guardian and the Observer have in any sense been involved in any activity with Mr Wright leading to the publication of his book They have not aided and abetted Mr Wright in his breach of duty." He concluded that if "a third party who is not a participator in the confidant's breach of duty receives information which at

the time of receipt is in the public domain - that is to say, he gets it from the public domain - in my judgment he would not, as at present advised, come under any duty of confidence" (ibid., 1265E).

(c) The Government had neither taken any steps to prosecute Mr Wright or the authors or editors of the earlier publications under the Official Secrets Act 1911 nor brought civil actions for breach of confidence seeking a declaration, damages or an account of profits.

(d) The claim for permanent injunctions against the newspapers was based on rather hypothetical grounds, for example: (1) their information was obtained directly or indirectly from Mr Wright; (2) they wished to publish further disclosures about the activities of the Security Service; (3) this would endanger the efficient operation of the Service and its "appearance of confidentiality"; and (4) this would also encourage other members or former members of the Service to publish confidential information.

(e) The evidence adduced by the Attorney General at the interlocutory stage was the two affidavits sworn by Sir Robert Armstrong in the Australian proceedings, which emphasized that the preservation of the appearance of confidentiality was essential to the effective operation of the Security Service. It deserves to be stressed that, in fact, as the Commission pointed out in its report (paragraph 89), "the evidence upon which the House of Lords based its decision on the merits in October 1988 was substantially available at the outset in July 1986 and fully available by July 1987".

B. The maintenance-of-the-authority-of-the-judiciary issue

9. As stated before, one aim of the temporary injunctions was the preservation of the rights of the Attorney General pending the substantive trial. The Government contended that the imposition of an interlocutory injunction to restrain publication of material which is the subject-matter of an action might, if publication in advance of the trial would destroy the substance of the action, in principle be considered necessary in a democratic society for maintaining the authority of the judiciary, in terms of the Court's above-mentioned Sunday Times judgment (Series A no. 30, p. 42, para. 66). While accepting in abstracto such a proposition, I consider, nevertheless, that in the circumstances of the present case the Government have failed to show that the grant of an injunction on this ground responded to any "pressing social need" or that the measure was proportionate to the aim pursued.

10. Interlocutory injunctions provisionally restrain the parties to a civil suit from taking any action that could endanger the final decision of the court. They are thus designed to preserve the status quo until the trial in order to ensure, in a case where an award of damages would not compensate for the injury caused by the defendant, that the judgment will be effective.

The general principles governing the grant of interlocutory injunctions were enunciated by the House of Lords in *American Cyanamid Co. v. Ethicon Ltd* ([1975] Appeal Cases 396; see paragraph 10 of the present judgment), a case relating to the alleged infringement of a patent. On that occasion the House modified the former criteria by directing that, instead of examining whether the evidence disclosed a *prima facie* case of infringement, the court should only check whether the plaintiff's claim for a permanent injunction had any real prospect of success, that is whether he had an arguable case. If the claim was not "frivolous or vexatious", the question whether an injunction should be granted was to be determined in the light of the "balance of convenience" between the conflicting interests of the litigants.

It was on the basis of these *American Cyanamid* rules that the Millett injunctions were granted and subsequently upheld in the interlocutory proceedings. 11. The application of these revised criteria clearly favours a plaintiff who seeks a temporary injunction because, without having a full trial on the main issue of whether or not the alleged confidential information may be published, he can succeed merely by showing that his case is "arguable".

Indeed, in the present case the rigid application of the *American Cyanamid* principles led to the "inevitable" imposition of a prior restraint on the media, which directly impaired O.G.'s freedom of expression and the right of the public to be informed quickly about matters of legitimate general concern, such as allegedly unlawful activities on the part of the Security Service.

Consequently, the legal strategy of the Attorney General turned out to be in conflict with the "necessity" test under Article 10 para. 2 (art. 10-2) of the Convention and the national courts, when balancing the conflicting interests at issue, did not give sufficient weight to the fundamental importance in a democratic society of freedom of expression.

The particular circumstances of the case, to which I have already referred in section A above, and the following factors, which were all clearly apparent when the claims for interlocutory injunctions were determined, meant that the restrictions on the media sought by the Government were not justified under Article 10 para. 2 (art. 10-2) for the aim of maintaining the authority of the judiciary.

(a) For the first time the Attorney General was instituting private-law proceedings relating to a breach by a former employee of the Security Service of his duty of confidence and, relying on a commercial-law precedent, was seeking an interlocutory injunction to preserve his claim for a permanent injunction as the sole means of protecting that duty of confidence. Lord Oliver of Aylmerton said, "I have not been able to find nor have your Lordships been referred to any previously reported decision which could be said to be even remotely parallel to the instant case"

(Attorney General v. Guardian Newspapers Ltd [1987] 1 Weekly Law Reports 1315G).

(b) In June 1986 Mr Wright's disclosures were already in the public domain and the information was no longer confidential because, as stated above, they had been published in several books and divulged by him in a television interview, with no reaction on the part of the Government. Mr Justice Millett was very explicit on this point when saying in his judgment, "the allegations themselves may be compiled from a number of published sources by anyone who takes the trouble to go to them" and "the objection is not to the allegations themselves, but to Mr Wright's input. It is true that Mr Wright has provided information on previous occasions, once in a television interview and, if footnotes to certain published works are to be believed, by collaborating with their author" (transcript, pp. 5C and 13B).

(c) As a consequence, the aim of preserving the status quo could not be attained because of the leakage of the confidential information and the absence of any previous reaction by the Government.

(d) The application of the American Cyanamid principles to a case of breach of confidence involving matters of legitimate public concern had the consequence of imposing on the media - without a full hearing on the issue of whether or not the information might be published - a prior restraint implying, because of the threat of contempt of court proceedings, a partial self-censorship.

In fact, the rationale of the Millett injunctions was to maintain the "appearance of confidentiality" of the Security Service by forbidding - through the imposition on the media, albeit temporarily, of an immediate restraint - the publication of anticipated further disclosures or "leakages" in the Service.

The English courts arrived at this decision after applying the "balance of convenience" test and this resulted in a serious limitation on freedom of expression. Mr Justice Millett said on this point (transcript, p. 8D) that "it makes no difference that the claim to suppress publication is made by the Government and not by a private litigant; the principles remain the same". However, while that test may be correct under English law, it is not acceptable when it comes to deciding whether a limitation of freedom of expression of the kind involved in this case is justified under Article 10 para. 2 (art. 10-2) of the Convention. I agree with the majority of the Commission that, when it is the Government which seek to restrict the dissemination of information that is of considerable public interest, the need for a temporary injunction "should be established with particular clarity and certainty" because of the predominant place occupied by freedom of expression and the international obligation incumbent on the public authorities not to interfere with it.

(e) The fact that, as noted in the interlocutory decisions, O.G. were in no way involved in Mr Wright's proposed publication was overshadowed by

their admission that they wished to publish credible information, of legitimate public concern, relating to the unlawful operation of the Security Service or the misconduct of its members. Mr Justice Millett's opinion that "disclosures to the proper authorities may be sufficient in some cases" also seems inconsistent with the right to receive and impart information and ideas enshrined in Article 10 (art. 10). The public has a right to be promptly informed on such matters, irrespective of whether a report is made to the proper authorities with a view to prosecution and punishment. Since a limitation on freedom of the press was involved, greater weight should have been given to the "iniquity defence" (the right to report misconduct) relied on by O.G.

The dangers of so rigid an application of this precedent were pointed out by Lord Oliver of Aylmerton when he said: "The guidelines laid down by this House in *American Cyanamid Co. v. Ethicon Ltd* ... have come to be treated as carved on tablets of stone, so that a plaintiff seeking interlocutory relief has never to do more than show that he has a fairly arguable case. Thus the effect in a contest between a would-be publisher and one seeking to restrain the publication of allegedly confidential information is that the latter, by presenting an arguable case, can effectively through the invocation of the law of contempt, restrain until the trial of the action, which may be two or more years ahead, publication not only by the defendant but by anyone else within the jurisdiction and thus stifle what may, in the end, turn out to be perfectly legitimate comment until it no longer has any importance or commands any public interest" (*Attorney General v. Times Newspapers Ltd* [1991] 2 Weekly Law Reports 1022B).

(f) The discretionary grant of an interlocutory injunction should not prejudice the final determination of the action, but the court, under the *American Cyanamid* principles, has to consider if the plaintiff has shown an "arguable case" or if he has a "good cause". The *fumus boni iuris* of the main action is thus an important element in the exercise of the discretion.

The circumstances of the present case did not show, or at least did not show with sufficient clarity, that the Attorney General had an arguable case for a permanent injunction. All the interlocutory decisions nevertheless reached the opposite conclusion and consequently the temporary injunctions were granted to preserve his rights pending trial.

Today, however, with the benefit of hindsight and after the judgments on the merits delivered at three levels, it is easy to affirm that such a "good cause" did not exist. The terms used by the judges leave no doubt on this issue. In his very thorough judgment of 21 December 1987 Mr Justice Scott said: "It is equally unacceptable that the government's assertion of what national security requires should suffice to decide the limitations that must be imposed on freedom of speech or of the press"; "In my view the articles represented the legitimate and fair reporting of a matter that the newspapers were entitled to place before the public, namely the court action in

Australia"; and he concluded categorically: "The Guardian and the Observer were not in breach of confidence in publishing the articles about the Australian Spycatcher case in their respective editions of 23 June 1986 and 22 June 1986." (*Attorney General v. Guardian Newspapers Ltd* (No. 2) [1990] 1 Appeal Cases 144B, 167H and 172H).

Likewise, when the House of Lords gave judgment on 13 October 1988, Lord Keith of Kinkel said (*ibid.*, 264A): "I consider that on balance the prospects are that the Crown would not have been held entitled to a permanent injunction. Scott J. and the majority of the Court of Appeal took that view, and I would not be disposed to differ from them." Lord Brightman affirmed (*ibid.*, 266E): "I agree with the majority of your Lordships that, despite the reprehensible leakage of information which was the source of these articles about the then forthcoming Australian proceedings, the articles were not in fact damaging to the public interest and are not therefore a proper foundation for any case by the Crown against these newspapers." And Lord Goff of Chieveley expressed himself in similar terms (*ibid.*, 290C): "the articles were very short: they give little detail of the allegations: a number of the allegations had been made before: and in so far as the articles went beyond what had previously been published, I do not consider that the judge erred in holding that, in the circumstance, the claim to an injunction was not proportionate to the legitimate aim pursued."

(g) The "temporary" and "provisional" nature of the interlocutory measures cannot justify under the Convention the restriction imposed on O.G.. As they asserted, "in many media cases, an interlocutory injunction is effectively a final injunction, because news is perishable ; a delay of weeks, months or more is equivalent to no publication". To "postpone" - the word used in the domestic judgments - information for more than two years could result in finding that the content had volatilised because of the transient character of the news.

(h) Finally, it was also obvious that the injunctions did not correspond to a "pressing social need" because, as the facts of this case have demonstrated, they were useless and unreal. It was plainly unreal to seek, by a judicial order, to restrain dissemination of news of general interest, or to seek, by an injunction against the media, to discourage members of State authorities who have access to secret, classified or simply confidential information of general interest from publishing it. And this unreality is even more evident when the news is written or broadcast in English: information is diffused universally in this language, notably by American or foreign publications or broadcasts that are sold or received in the United Kingdom. In today's circumstances such an injunction is an illusory measure since many of these media are outside the jurisdiction of the English courts.

Like the Vice-Chancellor in his judgment of 22 July 1987 (see paragraph 33 of the present judgment), I think that "there is a limit to what can be

achieved by orders of the court. If the courts were to make orders manifestly incapable of achieving their avowed purpose, such as to prevent the dissemination of information which is already disseminated, the law would to my mind indeed be an ass ... The truth of the matter is that in the contemporary world of electronics and jumbo jets news anywhere is news everywhere. But whilst the news is international, the jurisdiction of this court is strictly territorial" (*Attorney General v. Guardian Newspapers Ltd* [1987] 1 Weekly Law Reports 1269F and H).

This pragmatic reasoning is, in my opinion, sufficient to demonstrate that what is clearly impracticable cannot be considered "necessary". Likewise, the very limited effect of the ban on the British media shows that the restraints imposed on O.G. were manifestly disproportionate.

12. Consequently, taking all these factors separately and as a whole, I must depart from the majority's conclusion (see paragraph 65 of the judgment) that the national authorities were entitled to think that the interference complained of was necessary in a democratic society. Furthermore, I believe that the reasons expressed in paragraphs 68 and 69 of the judgment for finding a violation in the period after 30 July 1987 were also valid as regards the earlier period, when such of the information published in *Spycatcher* as was relevant was already known to the public (see paragraph 12 of the judgment).

I therefore conclude that there was a violation of Article 10 (art. 10) of the Convention in the period from 11 July 1986 to 30 July 1987, as well as in that from 30 July 1987 to 13 October 1988.



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF GOODWIN v. THE UNITED KINGDOM

(Application no. 17488/90)

In the case of Goodwin v. the United Kingdom (1),

The European Court of Human Rights, sitting, in pursuance of Rule 51 of Rules of Court A (2), as a Grand Chamber composed of the following judges:

Mr R. Ryssdal, President,

Mr R. Bernhardt,

Mr Thór Vilhjálmsson,

Mr F. Matscher,

Mr B. Walsh,

Mr C. Russo,

Mr A. Spielmann,

Mr J. De Meyer,

Mr N. Valticos,

Mrs E. Palm,

Mr F. Bigi,

Sir John Freeland,

Mr A.B. Baka,

Mr D. Gotchev,

Mr B. Repik,

Mr P. Jambrek,

Mr P. Kuris,

Mr U. Lohmus,

and also of Mr H. Petzold, Registrar, and Mr P.J. Mahoney, Deputy Registrar,

Having deliberated in private on 30 September 1995 and 22 February 1996,

Delivers the following judgment, which was adopted on the last-mentioned date:

Notes by the Registrar

1. The case is numbered 16/1994/463/544. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 20 May 1994, within the three-month period laid down by Article 32 para. 1 (art. 32-1) and Article 47 (art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in application (no. 17488/90) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 (art. 25) by Mr William Goodwin, a British citizen, on 27 September 1990.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10) of the Convention.

2. In response to the enquiry made in accordance with

Rule 33 para. 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyers who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 28 May 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr B. Walsh, Mr C. Russo, Mr J. De Meyer, Mrs E. Palm, Mr A.B. Baka and Mr B. Repik (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the United Kingdom Government ("the Government"), the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the orders made in consequence, the Registrar received the Government's memorial on 3 February 1995 and the applicant's memorial on 1 March. On 19 April 1995 the Secretary to the Commission indicated that the Delegate did not wish to reply in writing.

On various dates between 12 April and 7 September 1995 the Registrar received from the Government and the applicant observations on his Article 50 (art. 50) claim.

5. On 24 February 1995 the President, having consulted the Chamber, granted leave to Article 19 and Interights, two London based non-governmental human rights organisations, to submit observations on national law in the area in question in the present case, as applicable in certain countries (Rule 37 para. 2). Their comments were filed on 10 March 1995.

6. In accordance with the President's decision, the hearing took

place in public in the Human Rights Building, Strasbourg, on 24 April 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr I. Christie, Foreign and Commonwealth Office,	Agent,
Mr M. Baker, QC,	Counsel,
Mr M. Collon, Lord Chancellor's Department,	Adviser;

(b) for the Commission

Mrs G.H. Thune,	Delegate;
-----------------	-----------

(c) for the applicant

Mr G. Robertson QC,	Counsel,
Mr G. Bindman, Solicitor,	
Mr R.D. Sack, Attorney,	
Ms A.K. Hilker, Attorney,	
Ms L. Moore, Attorney,	
Mr J. Mortimer QC,	Advisers.

The Court heard addresses by Mrs Thune, Mr Robertson and Mr Baker and also replies to a question put by one of its members individually.

7. Following deliberations on 27 April 1995 the Chamber decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51 para. 1).

8. The Grand Chamber to be constituted included ex officio Mr Ryssdal, President of the Court, Mr R. Bernhardt, Vice-President of the Court, and the other members of the Chamber which had relinquished

jurisdiction (Rule 51 para. 2 (a) and (b)). On 5 May 1995, in the presence of the Registrar, the President drew by lot the names of the nine additional judges called on to complete the Grand Chamber, namely Mr F. Matscher, Mr A. Spielmann, Mr N. Valticos, Mr R. Pekkanen, Mr F. Bigi, Mr D. Gotchev, Mr P. Jambrek, Mr P. Kuris and Mr U. Lohmus (Rule 51 para. 2 (c)). Mr Pekkanen subsequently withdrew, being unable to take part in the further consideration of the case (Rule 24 para. 1 in conjunction with Rule 51 para. 6).

9. Having taken note of the opinions of the Agent of the Government, the Delegate of the Commission and the applicant, the Grand Chamber decided on 4 September 1995 that it was not necessary to hold a further hearing following the relinquishment of jurisdiction by the Chamber (Rules 26 and 38, taken together with Rule 51 para. 6).

AS TO THE FACTS

I. Particular circumstances of the case

10. Mr William Goodwin, a British national, is a journalist and lives in London.

11. On 3 August 1989 the applicant joined the staff of The Engineer, published by Morgan-Grampian (Publishers) Ltd ("the publishers"), as a trainee journalist. He was employed by Morgan Grampian PLC ("the employer").

On 2 November 1989 the applicant was telephoned by a person who, according to the applicant, had previously supplied him with information on the activities of various companies. The source gave him information about Tetra Ltd ("Tetra"), to the effect that the company was in the process of raising a £5 million loan and had financial problems as a result of an expected loss of £2.1 million for 1989 on a turnover of £20.3 million. The information was unsolicited and was not given in exchange for any payment. It was

provided on an unattributable basis. The applicant maintained that he had no reason to believe that the information derived from a stolen or confidential document. On 6 and 7 November 1989, intending to write an article about Tetra, he telephoned the company to check the facts and seek its comments on the information.

The information derived from a draft of Tetra's confidential corporate plan. On 1 November 1989 there had been eight numbered copies of the most recent draft. Five had been in the possession of senior employees of Tetra, one with its accountants, one with a bank and one with an outside consultant. Each had been in a ring binder and was marked "Strictly Confidential". The accountants' file had last been seen at about 3 p.m. on 1 November in a room they had been using at Tetra's premises. The room had been left unattended between 3 p.m. and 4 p.m. and during that period the file had disappeared.

A. Injunction and orders for disclosure of sources and documents

12. On 7 November 1989 Mr Justice Hoffmann of the High Court of Justice (Chancery Division) granted an application by Tetra of the same date for an ex parte interim injunction restraining the publishers of The Engineer from publishing any information derived from the corporate plan. The company informed all the national newspapers and relevant journals of the injunction on 16 November.

13. In an affidavit to the High Court dated 8 November 1989, Tetra stated that if the plan were to be made public it could result in a complete loss of confidence in the company on the part of its actual and potential creditors, its customers and in particular its suppliers, with a risk of loss of orders and of a refusal to supply the company with goods and services. This would inevitably lead to problems with Tetra's refinancing negotiations. If the company went into liquidation, there would be approximately four hundred redundancies.

14. On 14 November 1989 Mr Justice Hoffmann, on an application by

Tetra, ordered the publishers, under section 10 of the Contempt of Court Act 1981 ("the 1981 Act"; see paragraph 20 below), to disclose by 3 p.m. on 15 November the applicant's notes from the above telephone conversation identifying his source. On the latter date, the publishers having failed to comply with the order, Mr Justice Hoffmann granted Tetra leave to join the applicant's employer and the applicant himself to the proceedings and gave the defendants until 3 p.m. on the following day to produce the notes.

On 17 November 1989 the High Court made a further order to the effect that the applicant represented all persons who had received the plan or information derived from it without authority and that such persons should deliver up any copies of the plan in their possession. The motion was then adjourned for the applicant to bring this order to the attention of his source. However, the applicant declined to do so.

15. On 22 November 1989 Mr Justice Hoffmann ordered the applicant to disclose by 3 p.m. on 23 November his notes on the grounds that it was necessary "in the interests of justice", within the meaning of section 10 of the 1981 Act (see paragraph 20 below), for the source's identity to be disclosed in order to enable Tetra to bring proceedings against the source to recover the document, obtain an injunction preventing further publication or seek damages for the expenses to which it had been put. The judge concluded:

"There is strong prima facie evidence that it has suffered a serious wrong by the theft of its confidential file. There is similar evidence that it would suffer serious commercial damage from the publication of the information in the file during the near future. It is true that the source may not be the person who stole the file. He may have had the information second hand, although this is less likely. In either case, however, he was trying to secure damaging publication of information which he must have known to be sensitive and confidential. According to the respondent,

having given him the information he telephoned again a few days later to ask how the article was getting on. The plaintiff wishes to bring proceedings against the source for recovery of the document, an injunction against further publication and damages for the expense to which it has been put. But it cannot obtain any of those remedies because it does not know whom to sue. In the circumstance of this case, in which a remedy against the source is urgently needed, I think that disclosure is necessary in the interests of justice.

... There is no doubt on the evidence that the respondent was an innocent recipient of the information but the Norwich Pharmacal case shows that this does not matter. The question is whether he had become mixed up in the wrongdoing ...

The respondent has sworn an affidavit expressing the view that the public interest requires publication of the plaintiff's confidential commercial information. Counsel for the respondent says that the plaintiff's previous published results showed it as a prosperous expanding company and therefore the public was entitled to know that it was now experiencing difficulties. I reject this submission. There is nothing to suggest that the information in the draft business plan falsifies anything which has been previously made public or that the plaintiff was under any obligation, whether in law or commercial morality, to make that information available to its customers, suppliers and competitors. On the contrary, it seems to me that business could not function properly if such information could not be kept confidential."

16. On the same date the Court of Appeal rejected an application by the applicant for a stay of execution of the High Court's order, but substituted an order requiring the applicant either to disclose his

notes to Tetra or to deliver them to the Court of Appeal in a sealed envelope with accompanying affidavit. The applicant did not comply with this order.

B. Appeals to the Court of Appeal and to the House of Lords

17. On 23 November 1989 the applicant lodged an appeal with the Court of Appeal from Mr Justice Hoffmann's order of 22 November 1989. He argued that disclosure of his notes was not "necessary in the interests of justice" within the meaning of section 10 of the 1981 Act; the public interest in publication outweighed the interest in preserving confidentiality; and, since he had not facilitated any breach of confidence, the disclosure order against him was invalid.

The Court of Appeal dismissed the appeal on 12 December 1989. Lord Donaldson held:

"The existence of someone with access to highly confidential information belonging to the plaintiffs who was prepared to break his obligations of confidentiality in this way was a permanent threat to the plaintiffs which could only be eliminated by discovering his identity. The injunctions would no doubt be effective to prevent publication in the press, but they certainly would not effectively prevent publication to the plaintiffs' customers or competitors.

...

... I am loath in a judgment given in open court to give a detailed explanation of why this is a case in which, if the full facts were known and the courts had to say that they could give the plaintiffs no assistance, there would, I think, be a significant lessening in public confidence in the administration of justice generally. Suffice it to say that the plaintiffs are a, and perhaps the, leader in their very

important field, which I deliberately do not identify, with national and international customers and competitors. They are faced with a situation which is in part the result of their own success. They have reached a point at which they have to refinance and expand or go under with the loss not only of money, but of a significant number of jobs. This is not the situation in which the court should be or be seen to be impotent in the absence of compelling reasons. The plaintiffs are continuing with their refinancing discussions menaced by the source (or the source's source) ticking away beneath them like a time bomb. Prima facie they are entitled to assistance in identifying, locating and defusing it.

That I should have concluded that the disclosure of Mr Goodwin's source is necessary in the interests of justice is not determinative of this appeal. It does, however, mean that I have to undertake a balancing exercise. On the one hand there is the general public interest in maintaining the confidentiality of journalistic sources, which is the reason why section 10 was enacted. On the other is, in my judgment, a particular case in which disclosure is necessary in the general interests of the administration of justice. If these two factors stood alone, the case for ordering disclosure would be made out, because the parliamentary intention must be that, other things being equal, the necessity for disclosure on any of the four grounds should prevail. Were it otherwise, there would be no point in having these doorways.

But other things would not be equal if, on the particular facts of the case, there was some additional reason for maintaining the confidentiality of a journalistic source. It might, for example, have been the case that the information disclosed what, on the authorities, is quaintly called 'iniquity'. Or the plaintiffs might have been a public

company whose shareholders were unjustifiably being kept in ignorance of information vital to their making a sensible decision on whether or not to sell their shares. Such a feature would erode the public interest in maintaining the confidentiality of the leaked information and correspondingly enhance the public interest in maintaining the confidentiality of journalistic sources. Equally, on particular facts such as that the identification of the source was necessary in order to support or refute a defence of alibi in a major criminal trial, the necessity for disclosure 'in the interests of justice' might be enhanced and overreach the threshold of the statutory doorway requiring some vastly increased need for the protection of the source if it was to be counterbalanced. Once the [plaintiffs] can get through a doorway, the balancing exercise comes into play.

On the facts of this case, nothing is to be added to either side of the equation. The test of the needs of justice is met, but not in superabundance. The general public interest in maintaining the confidentiality of journalistic sources exists, but the facts of this particular case add absolutely nothing to it. No 'iniquity' has been shown. No shareholders have been kept in the dark. Indeed the public has no legitimate interest in the business of the plaintiffs who, although corporate in form, are in truth to be categorised as private individuals. This is in reality a piece of wholly unjustified intrusion into privacy.

Accordingly, I am left in no doubt that, notwithstanding the general need to protect journalistic sources, this is a case in which the balance comes down in favour of disclosure. I would dismiss the companies' appeals. I can see no reason in justice for doing otherwise with regard to Mr Goodwin's appeals."

Lord Justice McCowan stated that the applicant must have been "amazingly naïve" if it had not occurred to him that the source had been at the very least guilty of breach of confidence.

The Court of Appeal granted the applicant leave to appeal to the House of Lords.

18. The House of Lords upheld the Court of Appeal's decision on 4 April 1990, applying the principle expounded by Lord Reid in *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] Appeal Cases 133, a previous leading case:

"if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers."

Lord Bridge, in the first of the five separate speeches given in the applicant's case, underlined that in applying section 10 it was necessary to carry out a balancing exercise between the need to protect sources and, *inter alia*, the "interests of justice". He referred to a number of other cases in relation to how the balancing exercise should be conducted (in particular *Secretary of State for Defence v. Guardian Newspapers Ltd* [1985] Appeal Cases 339) and continued:

"... the question whether disclosure is necessary in the interests of justice gives rise to a more difficult problem of weighing one public interest against another. A question arising under this part of section 10 has not previously come before your Lordships' House for decision. In discussing the section generally Lord Diplock said in *Secretary of State for Defence v. Guardian Newspapers Ltd* [1985] Appeal Cases 339, 350:

'The exceptions include no reference to "the public interest" generally and I would add that in my view the expression "justice", the interests of which are entitled to protection, is not used in a general sense as the antonym of "injustice" but in the technical sense of the administration of justice in the course of legal proceedings in a court of law, or, by reason of the extended definition of "court" in section 19 of the Act of 1981 before a tribunal or body exercising the judicial power of the state.'

I agree entirely with the first half of this dictum. To construe 'justice' as the antonym of 'injustice' in section 10 would be far too wide. But to confine it to the 'technical sense of the administration of justice in the course of legal proceedings in a court of law' seems to me, with all respect due to any dictum of the late Lord Diplock, to be too narrow. It is, in my opinion, 'in the interests of justice', in the sense in which this phrase is used in section 10, that persons should be enabled to exercise important legal rights and to protect themselves from serious legal wrongs whether or not resort to legal proceedings in a court of law will be necessary to attain these objectives. Thus, to take a very obvious example, if an employer of a large staff is suffering grave damage from the activities of an unidentified disloyal servant, it is undoubtedly in the interests of justice that he should be able to identify him in order to terminate his contract of employment, notwithstanding that no legal proceedings may be necessary to achieve that end.

Construing the phrase 'in the interests of justice' in this sense immediately emphasises the importance of the balancing exercise. It will not be sufficient, per se, for a party seeking disclosure of a source protected by section 10 to

show merely that he will be unable without disclosure to exercise the legal right or avert the threatened legal wrong on which he bases his claim in order to establish the necessity of disclosure. The judge's task will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of the particular case on the one hand against the importance of protecting the source on the other hand. In this balancing exercise it is only if the judge is satisfied that disclosure in the interests of justice is of such preponderating importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached.

Whether the necessity of disclosure in this sense is established is certainly a question of fact rather than an issue calling for the exercise of the judge's discretion, but, like many other questions of fact, such as the question of whether somebody has acted reasonably in given circumstances, it will call for the exercise of a discriminating and sometimes difficult value judgment. In estimating the weight to be attached to the importance of disclosure in pursuance of the policy which underlies section 10 on the other hand, many factors will be relevant on both sides of the scale.

It would be foolish to attempt to give a comprehensive guidance as to how the balancing exercise should be carried out. But it may not be out of place to indicate the kind of factors which will require consideration. In estimating the importance to be given to the case in favour of disclosure there will be a wide spectrum within which the particular case must be located. If the party seeking disclosure shows, for example, that his very livelihood depends upon it, this will put the case near one end of the spectrum. If he shows no more than that what he seeks to protect is a minor

interest in property, this will put the case at or near the other end. On the other side the importance of protecting a source from disclosure in pursuance of the policy underlying the statute will also vary within a spectrum. One important factor will be the nature of the information obtained from the source. The greater the legitimate interest in the information which the source has given to the publisher or intended publisher, the greater will be the importance of protecting the source. But another and perhaps more significant factor which will very much affect the importance of protecting the source will be the manner in which the information was itself obtained by the source. If it appears to the court that the information was obtained legitimately this will enhance the importance of protecting the source. Conversely, if it appears that the information was obtained illegally, this will diminish the importance of protecting the source unless, of course, this factor is counterbalanced by a clear public interest in publication of the information, as in the classic case where the source has acted for the purpose of exposing iniquity. I draw attention to these considerations by way of illustration only and I emphasise once again that they are in no way intended to be read as a code ...

In the circumstances of the instant case, I have no doubt that [the High Court] and the Court of Appeal were right in finding that the necessity for disclosure of Mr Goodwin's notes in the interests of justice was established. The importance to the plaintiffs of obtaining disclosure lies in the threat of severe damage to their business, and consequentially to the livelihood of their employees, which would arise from disclosure of the information contained in their corporate plan while their refinancing negotiations are still continuing. This threat ... can only be defused if they can identify the source either as himself the thief of

the stolen copy of the plan or as a means to lead to the identification of the thief and thus put themselves in a position to institute proceedings for the recovery of the missing document. The importance of protecting the source on the other hand is much diminished by the source's complicity, at the very least, in a gross breach of confidentiality which is not counterbalanced by any legitimate interest which publication of the information was calculated to serve. Disclosure in the interests of justice is, on this view of the balance, clearly of preponderating importance so as to override the policy underlying the statutory protection of sources and the test of necessity for disclosure is satisfied ..."

Lord Templeman added that the applicant should have "recognised that [the information] was both confidential and damaging".

C. Fine for contempt of court

19. In the meantime, on 23 November 1989, the applicant had been served with a motion seeking his committal for contempt of court, an offence which was punishable by an unlimited fine or up to two years' imprisonment (section 14 of the 1981 Act). On 24 November, at a hearing in the High Court, counsel for the applicant had conceded that he had been in contempt but the motion was adjourned pending the appeal.

Following the House of Lord's dismissal of the appeal, the High Court, on 10 April 1990, fined the applicant £5,000 for contempt of court.

II. Relevant domestic law

20. Section 10 of the Contempt of Court Act 1981 provides:

"No court may require a person to disclose, nor is a person guilty of contempt of court for refusing to disclose the source of information contained in the publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

21. Section 14 (1) reads:

"In any case where a court has power to commit a person to prison for contempt of court and (apart from this provision) no limitation applies to the period of committal, the committal shall (without prejudice to the power of the court to order his earlier discharge) be for a fixed term, and that term shall not on any occasion exceed two years in the case of committal by a superior court, or one month in the case of committal by an inferior court."

22. In *Secretary of State for Defence v. Guardian Newspapers* Lord Diplock considered the expression "interests of justice" in section 10 of the 1981 Act:

"The exceptions include no reference to the 'public interest' generally and I would add that in my view the expression 'justice', the interests of which are entitled to protection, is not used in a general sense as the antonym of 'injustice' but in a technical sense of the administration of justice in the course of legal proceedings in a court of law ...

[The expression 'interests of justice'] ... refers to the administration of justice in particular legal proceedings already in existence or, in the type of 'bill of discovery' case ... exemplified by the *Norwich Pharmacal Co. v. Customs and Excise Commissioners* ... a particular civil action which

it is proposed to bring against a wrongdoer whose identity has not yet been ascertained. I find it difficult to envisage a civil action in which section 10 of the [1981] Act would be relevant other than one of defamation or for detention of goods where the goods, as in the instant case and in *British Steel Corporation v. Granada Television* ... consist of or include documents that have been supplied to the media in breach of confidence."

PROCEEDINGS BEFORE THE COMMISSION

23. In his application (no. 17488/90) of 27 September 1990 to the Commission, the applicant complained that the imposition of a disclosure order requiring him to reveal the identity of a source violated his right to freedom of expression under Article 10 (art. 10) of the Convention.

24. The Commission declared the application admissible on 7 September 1993. In its report of 1 March 1994 (Article 31) (art. 31), the Commission expressed the opinion that there had been a violation of Article 10 (art. 10) (by eleven votes to six). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment.

Note by the Registrar

1. For practical reasons this annex will appear only with the printed version of the judgment (Reports 1996-II), but a copy of the Commission's report is obtainable from the Registry.

FINAL SUBMISSIONS MADE TO THE COURT

25. At the hearing on 24 April 1995 the Government, as they had done in their memorial, invited the Court to hold that there had been

no violation of Article 10 (art. 10) of the Convention.

26. On the same occasion the applicant reiterated his request to the Court, stated in his memorial, to find that there had been a breach of Article 10 (art. 10) and to award him just satisfaction under Article 50 (art. 50) of the Convention.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 (art. 10) OF THE CONVENTION

27. The applicant alleged that the disclosure order requiring him to reveal the identity of his source and the fine imposed upon him for having refused to do so constituted a violation of Article 10 (art. 10) of the Convention, which reads:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

28. It was undisputed that the measures constituted an

interference with the applicant's right to freedom of expression as guaranteed by paragraph 1 of Article 10 (art. 10-1) and the Court sees no reason to hold otherwise. It must therefore examine whether the interference was justified under paragraph 2 of Article 10 (art. 10-2).

A. Was the interference "prescribed by law"?

29. The Court observes that, and this was not disputed, the impugned disclosure order and the fine had a basis in national law, namely sections 10 and 14 of the 1981 Act (see paragraphs 20 and 21 above). On the other hand, the applicant maintained that as far as the disclosure order was concerned the relevant national law failed to satisfy the foreseeability requirement which flows from the expression "prescribed by law".

30. The Government contested this allegation whereas the Commission did not find it necessary to reach a conclusion on this point.

31. The Court reiterates that, according to its case-law, the relevant national law must be formulated with sufficient precision to enable the persons concerned - if need be with appropriate legal advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. A law that confers a discretion is not in itself inconsistent with this requirement, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (see, for instance, the *Tolstoy Miloslavsky v. the United Kingdom* judgment of 13 July 1995, Series A no. 316-B, pp. 71-72, para. 37).

32. The applicant argued that the interests-of-justice exception to the protection of sources under section 10 of the 1981 Act was not sufficiently precise to enable journalists to foresee the circumstances

in which such an order could be made against them in order to protect a private company. By applying this provision to the present case, Lord Bridge had completely revised the interpretation given by Lord Diplock in *Secretary of State for Defence v. Guardian Newspapers*. The balancing exercise introduced by Lord Bridge amounted to subjective judicial assessment of factors based on retrospective evidence presented by the party seeking to discover the identity of the source (see paragraph 18 above). At the time the source provided the information, the journalist could not possibly know whether the party's livelihood depended upon such discovery and could not assess with any degree of certainty the public interest in the information. A journalist would usually be in a position to judge whether the information was acquired by legitimate means or not, but would not be able to predict how the courts would view the matter. The law, as it stood, was no more than a mandate to the judiciary to order journalists to disclose sources if they were "moved" by the complaint of an aggrieved party.

33. The Court recognises that in the area under consideration it may be difficult to frame laws with absolute precision and that a certain degree of flexibility may even be desirable to enable the national courts to develop the law in the light of their assessment of what measures are necessary in the interests of justice.

Contrary to what is suggested by the applicant, the relevant law did not confer an unlimited discretion on the English courts in determining whether an order for disclosure should be made in the interests of justice. Important limitations followed in the first place from the terms of section 10 of the 1981 Act, according to which an order for disclosure could be made if it was "established to the satisfaction of the court that disclosure [was] necessary in the interests of justice" (see paragraph 20 above).

In addition, at the material time, that is when the applicant received the information from his source, there existed not only an

interpretation by Lord Diplock of the interests-of-justice provision in section 10 in the case of *Secretary of State for Defence v. Guardian Newspapers* but also a ruling by Lord Reid in *Norwich Pharmacal Co. v. Customs and Excise Commissioners* (1973), to the effect that a person who through no fault of his own gets mixed up in wrongdoing may come under a duty to disclose the identity of the wrongdoer (see paragraphs 15, 18 and 22 above).

In the Court's view the interpretation of the relevant law made by the House of Lords in the applicant's case did not go beyond what could be reasonably foreseen in the circumstances (see, *mutatis mutandis*, the recent *S.W. v. the United Kingdom* judgment of 22 November 1995, Series A no. 335-B, p. 42, para. 36). Nor does it find any other indication that the law in question did not afford the applicant adequate protection against arbitrary interference.

34. Accordingly, the Court concludes that the impugned measures were "prescribed by law".

B. Did the interference pursue a legitimate aim?

35. It was not disputed before the Convention institutions that the aim of the impugned measures was to protect Tetra's rights and that the interference thus pursued a legitimate aim. The Government maintained that the measures were also taken for the prevention of crime.

36. The Court, being satisfied that the interference pursued the first of these aims, does not find it necessary to determine whether it also pursued the second.

C. Was the interference "necessary in a democratic society"?

37. The applicant and the Commission were of the opinion that Article 10 (art. 10) of the Convention required that any compulsion

imposed on a journalist to reveal his source had to be limited to exceptional circumstances where vital public or individual interests were at stake. This test was not satisfied in the present case. The applicant and the Commission invoked the fact that Tetra had already obtained an injunction restraining publication (see paragraph 12 above), and that no breach of that injunction had occurred. Since the information in question was of a type commonly found in the business press, they did not consider that the risk of damage that further publication could cause was substantiated by Tetra, which had suffered none of the harm adverted to.

The applicant added that the information was newsworthy even though it did not reveal matters of vital public interest, such as crime or malfeasance. The information about Tetra's mismanagement, losses and loan-seeking activities was factual, topical and of direct interest to customers and investors in the market for computer software. In any event, the degree of public interest in the information could not be a test of whether there was a pressing social need to order the source's disclosure. A source may provide information of little value one day and of great value the next; what mattered was that the relationship between the journalist and the source was generating the kind of information which had legitimate news potential. This was not to deny Tetra's entitlement to keep its operations secret, if it could, but to contest that there was a pressing social need for punishing the applicant for refusing to disclose the source of the information which Tetra had been unable to keep secret.

38. The Government contended that the disclosure order was necessary in a democratic society for the protection of "the rights" of Tetra. The function of the domestic courts was both to ascertain facts and, in the light of the facts established, to determine the legal consequences which should flow from them. In the Government's view, the supervisory jurisdiction of the Convention institutions extended only to the latter. These limitations on the Convention

review were of importance in the present case, where the national courts had proceeded on the basis that the applicant had received the information from his source in ignorance as to its confidential nature, although, in fact, this was something he ought to have recognised. Moreover, the source was probably the thief of the confidential business plan and had improper motives for divulging the information. In addition, the plaintiffs would suffer serious commercial damage from further publication of the information. These findings by the domestic courts were based upon the evidence which was placed before them.

It was further submitted that there was no significant public interest in the publication of the confidential information received by the applicant. Although there is a general public interest in the free flow of information to journalists, both sources and journalists must recognise that a journalist's express promise of confidentiality or his implicit undertaking of non-attributability may have to yield to a greater public interest. The journalist's privilege should not extend to the protection of a source who has conducted himself *mala fide* or, at least, irresponsibly, in order to enable him to pass on, with impunity, information which has no public importance. The source in the present case had not exercised the responsibility which was called for by Article 10 (art. 10) of the Convention. The information in issue did not possess a public-interest content which justified interference with the rights of a private company such as Tetra.

Although it was true that effective injunctions had been obtained, so long as the thief and the source remained untraced, the plaintiffs were at risk of further dissemination of the information and, consequently, of damage to their business and to the livelihood of their employees. There were no other means by which Tetra's business confidence could have been protected.

In these circumstances, according to the Government, the order requiring the applicant to divulge his source and the further order fining him for his refusal to do so did not amount to a breach of the

applicant's rights under Article 10 (art. 10) of the Convention.

39. The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance (see, as a recent authority, the *Jersild v. Denmark* judgment of 23 September 1994, Series A no. 298, p. 23, para. 31).

Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms (see, amongst others, the Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) and Resolution on the Confidentiality of Journalists' Sources by the European Parliament, 18 January 1994, Official Journal of the European Communities No. C 44/34). Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest.

These considerations are to be taken into account in applying to the facts of the present case the test of necessity in a democratic society under paragraph 2 of Article 10 (art. 10-2).

40. As a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established

(see the *Sunday Times v. the United Kingdom* (no. 2) judgment of 26 November 1991, Series A no. 217, pp. 28-29, para. 50, for a statement of the major principles governing the "necessity" test). Admittedly, it is in the first place for the national authorities to assess whether there is a "pressing social need" for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In the present context, however, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under paragraph 2 of Article 10 (art. 10-2), whether the restriction was proportionate to the legitimate aim pursued. In sum, limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court.

The Court's task, in exercising its supervisory function, is not to take the place of the national authorities but rather to review under Article 10 (art. 10) the decisions they have taken pursuant to their power of appreciation. In so doing, the Court must look at the "interference" complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

41. In the instant case, as appears from Lord Bridge's speech in the House of Lords, Tetra was granted an order for source disclosure primarily on the grounds of the threat of severe damage to their business, and consequently to the livelihood of their employees, which would arise from disclosure of the information in their corporate plan while their refinancing negotiations were still continuing (see paragraph 18 above). This threat, "ticking away beneath them like a time bomb", as Lord Donaldson put it in the Court of Appeal (see paragraph 17 above), could only be defused, Lord Bridge considered, if they could identify the source either as himself the thief of the stolen copy of the plan or as a means to lead to identification of the thief and thus put the company in a position to institute proceedings

for the recovery of the missing document. The importance of protecting the source, Lord Bridge concluded, was much diminished by the source's complicity, at the very least, in a gross breach of confidentiality which was not counterbalanced by any legitimate interest in publication of the information (see paragraph 18 above).

42. In the Court's view, the justifications for the impugned disclosure order in the present case have to be seen in the broader context of the *ex parte* interim injunction which had earlier been granted to the company, restraining not only the applicant himself but also the publishers of *The Engineer* from publishing any information derived from the plan. That injunction had been notified to all the national newspapers and relevant journals (see paragraph 12 above). The purpose of the disclosure order was to a very large extent the same as that already being achieved by the injunction, namely to prevent dissemination of the confidential information contained in the plan. There was no doubt, according to Lord Donaldson in the Court of Appeal, that the injunction was effective in stopping dissemination of the confidential information by the press (see paragraph 17 above). Tetra's creditors, customers, suppliers and competitors would not therefore come to learn of the information through the press. A vital component of the threat of damage to the company had thus already largely been neutralised by the injunction. This being so, in the Court's opinion, in so far as the disclosure order merely served to reinforce the injunction, the additional restriction on freedom of expression which it entailed was not supported by sufficient reasons for the purposes of paragraph 2 of Article 10 (art. 10-2) of the Convention.

43. What remains to be ascertained by the Court is whether the further purposes served by the disclosure order provided sufficient justification.

44. In this respect it is true, as Lord Donaldson put it, that the injunction "would not effectively prevent publication to [Tetra's]

customers or competitors" directly by the applicant journalist's source (or that source's source) (see paragraph 17 above). Unless aware of the identity of the source, Tetra would not be in a position to stop such further dissemination of the contents of the plan, notably by bringing proceedings against him or her for recovery of the missing document, for an injunction against further disclosure by him or her and for compensation for damage.

It also had a legitimate reason as a commercial enterprise in unmasking a disloyal employee or collaborator, who might have continuing access to its premises, in order to terminate his or her association with the company.

45. These are undoubtedly relevant reasons. However, as also recognised by the national courts, it will not be sufficient, *per se*, for a party seeking disclosure of a source to show merely that he or she will be unable without disclosure to exercise the legal right or avert the threatened legal wrong on which he or she bases his or her claim in order to establish the necessity of disclosure (see paragraph 18 above). In that connection, the Court would recall that the considerations to be taken into account by the Convention institutions for their review under paragraph 2 of Article 10 (art. 10-2) tip the balance of competing interests in favour of the interest of democratic society in securing a free press (see paragraphs 39 and 40 above). On the facts of the present case, the Court cannot find that Tetra's interests in eliminating, by proceedings against the source, the residual threat of damage through dissemination of the confidential information otherwise than by the press, in obtaining compensation and in unmasking a disloyal employee or collaborator were, even if considered cumulatively, sufficient to outweigh the vital public interest in the protection of the applicant journalist's source. The Court does not therefore consider that the further purposes served by the disclosure order, when measured against the standards imposed by the Convention, amount to an overriding requirement in the public interest.

46. In sum, there was not, in the Court's view, a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve that aim. The restriction which the disclosure order entailed on the applicant journalist's exercise of his freedom of expression cannot therefore be regarded as having been necessary in a democratic society, within the meaning of paragraph 2 of Article 10 (art. 10-2), for the protection of Tetra's rights under English law, notwithstanding the margin of appreciation available to the national authorities.

Accordingly, the Court concludes that both the order requiring the applicant to reveal his source and the fine imposed upon him for having refused to do so gave rise to a violation of his right to freedom of expression under Article 10 (art. 10).

II. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

47. Mr William Goodwin sought just satisfaction under Article 50 (art. 50) of the Convention, which reads:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Non-pecuniary damage

48. The applicant claimed 15,000 pounds sterling for non-pecuniary damage, on account of mental anguish, shock, dismay and anxiety which he felt as a result of the proceedings against him. For five months

he was in constant peril of being sent to prison, for up to two years, as a punishment for obeying his conscience and for living up to his ethical obligations as a journalist. He still has to live with a criminal record since his crime of contempt of court would not be expunged by a finding of breach by the Court. He had been the subject of harassment by court process servers and his employers so as to comply with a court order against themselves, all of which was added to the pressure exerted on him by the threat of dismissal if he did not disclose the identity of his source.

49. The Government objected to the applicant's claim on the ground that the alleged adverse consequences stemmed from the fact that he was defying and disobeying the law. Even if he considered it a bad law, he should have obeyed the order to provide the information to the court in a sealed envelope, or, at the very least, he should have recognised his duty to obey the disclosure order when he lost his case in the House of Lords. Had he done so, the Government would have found it difficult to resist a claim for compensation for any adverse consequences.

50. The Court is not persuaded by the Government's arguments. What matters under Article 50 (art. 50) is whether the facts found to constitute a violation have resulted in non-pecuniary damage. In the present case, the Court finds it established that there was a causal link between the anxiety and distress suffered by the applicant and the breach found of the Convention. However, in the circumstances of the case, the Court considers that this finding constitutes adequate just satisfaction in respect of the damage claimed under this head.

B. Costs and expenses

51. The applicant further sought reimbursement of costs and expenses totalling £49,500, in respect of the following items specified in his memorial to the Court of 1 March 1995:

(a) £19,500 for counsel's fees for drafting the application to the Commission and written observations to the latter and the Court and for preparing and presenting the case before both the Commission and the Court;

(b) £30,000 for work by the applicant's solicitors in connection with the proceedings before the Commission and the Court.

To the above amounts should be added any applicable value added tax (VAT).

52. The Government, by letter of 11 April 1995, invited the applicant to provide a detailed breakdown of the costs.

53. In a letter of 25 July 1995 the applicant stated that the solicitors' work before the Commission and Court amounted to a total of 136 hours at, on average, £250 per hour for a senior partner and £150 per hour for an assistant solicitor.

54. On 30 August 1995, the Government submitted their comments on the breakdown provided by the applicant. Without prejudice to the Court's decision regarding the belatedness of the applicant's claim, they stated that they considered that the £19,500 sought in respect of counsel was unreasonably high and that £16,000 would be reasonable.

As to solicitors' fees, the Government regarded the rates and the number of hours claimed as excessive. In their view 110 hours at an average rate of £160 per hour for a senior partner and £100 per hour for an assistant solicitor would be reasonable.

According to the Government's calculations, it would be reasonable to indemnify the applicant £37,595.50 (VAT included) for costs.

55. By letter of 1 September 1995, the applicant stressed that the

number of hours and the hourly rates claimed were reasonable. He conceded that if the Court found in his favour, it could properly in its discretion award the amounts indicated by the Government. He stated that he would be prepared to settle for a total figure midway between the total figures contended for by the two parties.

56. The Court considers the sum conceded by the Government to be adequate in the circumstances of the present case. The Court therefore awards the applicant £37,595.50 (VAT included) for legal costs and expenses, less the 9,300 French francs already paid in legal aid by the Council of Europe in respect of legal fees.

C. Default interest

57. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT

1. Holds by eleven votes to seven that there has been a violation of Article 10 (art. 10) of the Convention;
2. Holds unanimously that the finding of a violation constitutes adequate just satisfaction for the non-pecuniary damage suffered by the applicant;
3. Holds unanimously:
 - (a) that the respondent State is to pay to the applicant, within three months, in respect of costs and expenses £37,595.50 (thirty seven thousand, five hundred and ninety five pounds sterling and fifty pence) less 9,300 (nine thousand, three hundred) French francs to be converted into pounds sterling at the rate applicable on the date of

delivery of the present judgment;

(b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;

4. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 March 1996.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr De Meyer;

(b) joint dissenting opinion of Mr Ryssdal, Mr Bernhardt, Mr Thór Vilhjálmsson, Mr Matscher, Mr Walsh, Sir John Freeland and Mr Baka;

(c) separate dissenting opinion of Mr Walsh.

Initialled: R. R.

Initialled: H. P.

CONCURRING OPINION OF JUDGE DE MEYER

I fully agree with the Court's conclusion that the order requiring the applicant to reveal his source and the fine imposed upon him for having refused to do so violated his right to freedom of expression.

I would however observe that so did also, in my view, the earlier injunction against publication of the information (1), since it was an utterly unacceptable form of prior restraint (2).

1. Paragraphs 12 and 42 of the judgement.

2. See my partly dissenting opinion on that matter in the case of *Observer and Guardian v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216, p.46.

Even if there had not been such an injunction the disclosure order and the ensuing fine would not have been legitimate. The protection of a journalist's source is of such a vital importance for the exercise of his right to freedom of expression that it must, as a matter of course, never be allowed to be infringed upon, save perhaps in very exceptional circumstances, which certainly did not exist in the present case.

JOINT DISSENTING OPINION OF JUDGES RYSSDAL,
BERNHARDT, THÓR VILHJÁLMSSON, MATSCHER,
WALSH, SIR JOHN FREELAND AND BAKA

1. We are unable to agree that, as the majority conclude in paragraph 46 of the judgment, "both the order requiring the applicant to reveal his source and the fine imposed upon him for having refused to do so gave rise to a violation of his right to freedom of expression under Article 10 (art. 10)".

2. We of course fully accept that, as is recalled in paragraph 39 of the judgment, freedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are of particular importance. We likewise agree that, as the paragraph goes on to say, "Protection of journalistic sources is one of the basic conditions for press freedom ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected". It follows that an order for source disclosure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified under paragraph 2 of that Article (art. 10-2).
3. Where we part company with the majority is in the assessment of whether, in the circumstances of the present case, such a justification existed - whether, in particular, the test of necessity in a democratic society should be regarded as having been satisfied.
4. As regards the test in domestic law, section 10 of the Contempt of Court Act 1981 clearly gives statutory force to a presumption against disclosure of sources. It provides (see paragraph 20 of the judgment) that no court may require disclosure "unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime".
5. As explained by Lord Bridge in the House of Lords in the applicant's case, this statutory restriction operates unless the party seeking disclosure can satisfy the court that "disclosure is necessary" in the interests of one of the four matters of public concern that are listed in the section. In asking himself the question whether disclosure of the source of some particular information is necessary to serve one of the interests in question, the judge has to engage in a balancing exercise: he must start "with the assumptions, first, that

the protection of sources is itself a matter of high public importance, secondly, that nothing less than necessity will suffice to override it, thirdly, that the necessity can only arise out of concern for another matter of high public importance, being one of the four interests listed in the section". Dealing with the way in which the judge should determine necessity where, as here, the relevant interests are those of justice, Lord Bridge said that it would never be enough for a party seeking disclosure of a source protected by the section to show merely that he will be unable without disclosure to exercise a legal right or avert a threatened legal wrong. "The judge's task will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of the particular case on the one hand against the importance of protecting the source on the other hand. In this balancing exercise it is only if the judge is satisfied that disclosure in the interests of justice is of such preponderating importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached."

6. Given that, as the judgment accepts, the protection of Tetra's rights by way of the "interests-of-justice" exception amounts to the pursuit of a legitimate aim under paragraph 2 of Article 10 (art. 10-2), the domestic-law test of necessity strikingly resembles that required by the Convention. The domestic courts at three levels, on the basis of all the evidence which was before them, concluded that disclosure was necessary in the interests of justice. Factors which Lord Bridge stressed, in support of his conclusion that the judge at first instance and the Court of Appeal were right in finding that the necessity for disclosure in the interests of justice was established, were the following. First, the importance to Tetra of obtaining disclosure lay in the threat of severe damage to their business, and consequentially to the livelihood of their employees, which would arise from disclosure of the information contained in their corporate plan while their refinancing operations were still continuing. This threat could only be defused if they could identify the source as himself the thief of the stolen copy of the plan or as a means to lead to

identification of the thief and thus put themselves in a position to institute proceedings for the recovery of the missing document. Secondly, the importance of protecting the source was much diminished by the source's complicity, at the very least, in a gross breach of confidentiality which was not counterbalanced by any legitimate interest which publication of the information was calculated to serve. In this view of the balance, disclosure in the interests of justice was clearly of preponderating importance so as to override the policy underlying the statutory protection of sources and the test of necessity for disclosure was satisfied.

7. The judgment, on the other hand, concludes that there was not a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve that aim (paragraph 46). In reaching this conclusion, the judgment first says (rightly), in paragraph 42, that the justifications for the disclosure order have to be seen in the broader context of the injunction which Tetra had already obtained. That injunction was effective in stopping dissemination of the confidential information by the press, so that a "vital component of the threat of damage to the company had ... already largely been neutralised ...". "This being so", the paragraph continues "... in so far as the disclosure order merely served to reinforce the injunction, the additional restriction on freedom of expression which it entailed was not supported by sufficient reasons for the purposes of paragraph 2 of Article 10 (art. 10-2) ..".

8. To suggest, however, that the disclosure order may have "merely served to reinforce the injunction" is to misstate the case. As the decisions of the domestic courts explain, the purpose of the disclosure order was to extend the protection of Tetra's rights by closing gaps left by the injunction. The injunction bit upon the press, but it would not effectively prevent publication to Tetra's customers or competitors directly by the applicant's source (or that source's source). Without knowing the identity of the source, Tetra

would not be in a position to stop further dissemination of the contents of the plan by bringing proceedings against him for recovery of the missing document, for an injunction prohibiting further disclosure by him and for damages. Nor would they be able to remove any threat of further harm to their interests from a possible disloyal employee or collaborator who might enjoy continued access to their premises.

9. These further purposes served by the disclosure order are considered in paragraphs 44 and 45 of the judgment. The latter paragraph, after recalling that the considerations to be taken into account by the Convention institutions for their review under paragraph 2 of Article 10 (art. 10-2) "tip the balance of competing interests in favour of the interest of democratic society in securing a free press", asserts that Tetra's interests in securing the additional measures of protection sought through the disclosure order were insufficient to outweigh the vital public interest in the protection of the applicant's source.

10. No detailed assessment of these interests of Tetra's is, however, undertaken, and in the absence of it there is no satisfactory basis for the balancing exercise which the Court is required to undertake. The domestic courts were, in any event, better placed to evaluate, on the basis of the evidence before them, the strength of those interests, and in our view the conclusion which they reached as to where, in the light of their evaluation, the corresponding balance should be struck was within the margin of appreciation allowed to the national authorities.

11. We therefore conclude that neither the disclosure order nor the fine imposed upon the applicant for his failure to comply with it gave rise to a violation of his right to freedom of expression under Article 10 (art. 10).

SEPARATE DISSENTING OPINION OF JUDGE WALSH

1. In his opening address to the Court counsel for the applicant stated that his client was "claiming no special privilege by virtue of his profession because journalists are not above the law". Yet it appears to me that the Court in its decision has decided in effect that under the Convention a journalist is by virtue of his profession to be afforded a privilege not available to other persons. Should not the ordinary citizen writing a letter to the papers for publication be afforded an equal privilege even though he is not by profession a journalist? To distinguish between the journalist and the ordinary citizen must bring into question the provisions of Article 14 (art. 14) of the Convention.

2. In the present case the applicant did not suffer any denial of expressing himself. Rather has he refused to speak. In consequence a litigant seeking the protection of the law for his interests which were wrongfully injured is left without the remedy the courts had decided he was entitled to. Such a result is certainly a matter of public interest and the applicant has succeeded in frustrating his national courts in their efforts to act in the interests of justice. It is for the national courts to decide whether or not the document in question was stolen. Yet the applicant claims that because he does not believe it was stolen he can justify his refusal to comply with the court order made in his case. His attitude and his words give the impression that he would comply if he believed the document in question had been stolen. He is thus setting up his personal belief as to truth of a fact which is exclusively within the domain of the national courts to decide as a justification for not obeying the order of the courts simply because he does not agree with the judicial findings of fact.

3. It does not appear to me that anything in the Convention permits a litigant to set up his own belief as to the facts against the finding of fact made by the competent courts and thereby seek to justify a refusal to be bound by such judicial finding of fact. To permit him to do so simply because he is a journalist by profession is

to submit the judicial process to the subjective assessment of one of the litigants and to surrender to that litigant the sole decision as to the moral justification for refusing to obey the court order in consequence of which the other litigant is to be denied justice and to suffer damage. Thus there is a breach of a primary rule of natural justice - no man is to be the judge of his own cause.



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF VON HANNOVER v. GERMANY

(Application no. 59320/00)

JUDGMENT

STRASBOURG

24 June 2004

FINAL

24/09/2004

In the case of Von Hannover v. Germany,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr I. CABRAL BARRETO, *President*,

Mr G. RESS,

Mr L. CAFLISCH,

Mr R. TÜRMESEN,

Mr B. ZUPANČIČ,

Mr J. HEDIGAN,

Mr K. TRAJA, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 6 November 2003 and 3 June 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 59320/00) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a national of Monaco, Caroline von Hannover (“the applicant”), on 6 June 2000.

2. The applicant alleged that the German court decisions in her case had infringed her right to respect for her private and family life as guaranteed by Article 8 of the Convention.

3. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

4. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section (Rule 52 § 1).

5. By a decision of 8 July 2003, the Chamber declared the application admissible.

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1). In addition, comments were received from the Association of German Magazine Publishers (*Verband deutscher Zeitschriftenverleger*) and from Hubert Burda Media GmbH & Co. KG, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). The applicant replied to those comments (Rule 44 § 5).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 6 November 2003 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr K. STOLTENBERG, <i>Ministerialdirigent</i> ,	<i>Agent</i> ,
Mr A. OHLY, Professor of civil law at Bayreuth University,	<i>Counsel</i> ,
Mrs A. LAITENBERGER, executive assistant to the Agent,	<i>Adviser</i> ;

(b) *for the applicant*

Mr M. PRINZ, lawyer,	<i>Counsel</i> ,
Ms C. MOFFAT, lawyer,	
Mr A. TOUCAS, lawyer,	<i>Advisers</i> .

The Court heard addresses by Mr Prinz, Mr Stoltenberg and Mr Ohly.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant, who is the eldest daughter of Prince Rainier III of Monaco, was born in 1957. Her official residence is in Monaco but she lives in the Paris area most of the time.

As a member of Prince Rainier's family, the applicant is the president of certain humanitarian or cultural foundations, such as the Princess Grace Foundation or the Prince Pierre of Monaco Foundation, and also represents the ruling family at events such as the Red Cross Ball or the opening of the International Circus Festival. She does not, however, perform any function within or on behalf of the State of Monaco or any of its institutions.

A. Background to the case

9. Since the early 1990s the applicant has been trying – often through the courts – in a number of European countries to prevent the publication of photos about her private life in the tabloid press.

10. The photos that were the subject of the proceedings described below were published by the Burda publishing company in the German magazines *Bunte* and *Freizeit Revue*, and by the Heinrich Bauer publishing company in the German magazine *Neue Post*.

1. The first series of photos

(a) The five photos of the applicant published in *Freizeit Revue* magazine (issue no. 30 of 22 July 1993)

11. These photos show her with the actor Vincent Lindon at the far end of a restaurant courtyard in Saint-Rémy-de-Provence. The first page of the magazine refers to “The most tender photos of her romance with Vincent” (“*Die zärtlichsten Fotos Ihrer Romanze mit Vincent*”) and the photos themselves bear the caption “These photos are evidence of the most tender romance of our time” (“*Diese Fotos sind der Beweis für die zärtlichste Romanze unserer Zeit*”).

(b) The two photos of the applicant published in *Bunte* magazine (issue no. 32 of 5 August 1993)

12. The first photo shows her on horseback with the caption “Caroline and the blues. Her life is a novel with innumerable misfortunes, says the author Roig” (“*Caroline und die Melancholie. Ihr Leben ist ein Roman mit unzähligen Unglücken, sagt Autor Roig*”).

The second photo shows her with her children Pierre and Andrea.

The photos are part of an article entitled “I don’t think I could be a man’s ideal wife” (“*Ich glaube nicht, dass ich die ideale Frau für einen Mann sein kann*”).

(c) The seven photos of the applicant published in *Bunte* magazine (issue no. 34 of 19 August 1993)

13. The first photo shows her canoeing with her daughter Charlotte, the second shows her son Andrea with a bunch of flowers in his arms.

The third photo shows her doing her shopping with a bag slung over her shoulder, the fourth with Vincent Lindon in a restaurant and the fifth alone on a bicycle.

The sixth photo shows her with Vincent Lindon and her son Pierre.

The seventh photo shows her doing her shopping at the market, accompanied by her bodyguard.

The article is entitled “Pure happiness” (“*Vom einfachen Glück*”).

2. The second series of photos

(a) The ten photos of the applicant published in *Bunte* magazine (issue no. 10 of 27 February 1997)

14. These photos show the applicant on a skiing holiday in Zürs/Arlberg. The accompanying article is entitled “Caroline... a woman returns to life” (“*Caroline... eine Frau kehrt ins Leben zurück*”).

(b) The eleven photos of the applicant published in *Bunte* magazine (issue no. 12 of 13 March 1997)

15. Seven photos show her with Prince Ernst August von Hannover at a horse show in Saint-Rémy-de-Provence. The accompanying article is entitled “The kiss. Or: they are not hiding anymore” (“*Der Kuss. Oder: jetzt verstecken sie sich nicht mehr*”).

Four other photos show her leaving her house in Paris with the caption “Out and about with Princess Caroline in Paris” (“*Mit Prinzessin Caroline unterwegs in Paris*”).

(c) The seven photos of the applicant published in *Bunte* magazine (issue no. 16 of 10 April 1997)

16. These photos show the applicant on the front page with Prince Ernst August von Hannover and on the inside pages of the magazine playing tennis with him or both putting their bicycles down.

3. The third series of photos

17. The sequence of photos published in *Neue Post* magazine (issue no. 35/97) shows the applicant at the Monte Carlo Beach Club, dressed in a swimsuit and wrapped up in a bathing towel, tripping over an obstacle and falling down. The photos, which are quite blurred, are accompanied by an article entitled “Prince Ernst August played fisticuffs and Princess Caroline fell flat on her face” (“*Prinz Ernst August haute auf den Putz und Prinzessin Caroline fiel auf die Nase*”).

B. The proceedings in the German courts

1. The first set of proceedings

(a) Judgment of the Hamburg Regional Court of 4 February 1993

18. On 13 August 1993 the applicant sought an injunction in the Hamburg Regional Court (*Landgericht*) against any further publication by the Burda publishing company of the first series of photos on the ground that they infringed her right to protection of her personality rights (*Persönlichkeitsrecht*), guaranteed by Articles 2 § 1 and 1 § 1 of the Basic Law (*Grundgesetz*), and her right to protection of her private life and to the control of the use of her image, guaranteed by sections 22 et seq. of the Copyright (Arts Domain) Act (*Kunsturhebergesetz* – “the Copyright Act” – see paragraphs 40-41 below).

19. In a judgment of 4 February 1993, the Regional Court granted the application only in respect of the distribution of the magazines in France, in accordance with the rules of private international law (section 38 of the

Introductory Act to the Civil Code – *Einführungsgesetz in das bürgerliche Gesetzbuch*) read in conjunction with Article 9 of the French Civil Code.

With regard to the distribution of the magazines in Germany, however, the Regional Court reiterated that it was German law which applied. Under section 23(1) no. 1 of the Copyright Act, the applicant, as a figure of contemporary society “*par excellence*” (*eine “absolute” Person der Zeitgeschichte*), had to tolerate this kind of publication.

The Regional Court held that she had failed to establish a legitimate interest (*berechtigtes Interesse*) justifying an injunction against further publication because, where figures of contemporary society “*par excellence*” were concerned, the right to protection of private life stopped at their front door. All the photos of the applicant had been taken exclusively in public places.

(b) Judgment of the Hamburg Court of Appeal of 8 December 1994

20. The applicant appealed against that judgment.

21. In a judgment of 8 December 1994, the Hamburg Court of Appeal (*Oberlandesgericht*) dismissed the applicant’s appeal and set aside the injunction against subsequent publications in France.

Indeed, like the Regional Court, the Court of Appeal found that the applicant was a contemporary figure “*par excellence*” and therefore had to tolerate publication without her consent of the photos in question, which had all been taken in public places. Even if the constant hounding by photographers made her daily life difficult, it arose from a legitimate desire to inform the general public.

(c) Judgment of the Federal Court of Justice of 19 December 1995

22. The applicant appealed on points of law against that judgment.

23. In a judgment of 19 December 1995, the Federal Court of Justice (*Bundesgerichtshof*) allowed the applicant’s appeal in part, granting her an injunction against any further publication of the photos that had appeared in *Freizeit Revue* magazine (issue no. 30 of 22 July 1993) showing her with Vincent Lindon in a restaurant courtyard on the ground that the photos interfered with her right to respect for her private life.

The Federal Court held that even figures of contemporary society “*par excellence*” were entitled to respect for their private life and that this was not limited to their home but also covered the publication of photos. Outside their home, however, they could not rely on the protection of their privacy unless they had retired to a secluded place – away from the public eye (*in eine örtliche Abgeschiedenheit*) – where it was objectively clear to everyone that they wanted to be alone and where, confident of being away from prying eyes, they behaved in a given situation in a manner in which they would not behave in a public place. Unlawful interference with the protection of that privacy could therefore be made out if photos were

published that had been taken secretly and/or by catching unawares a person who had retired to such a place. That was the position here, where the applicant and her male companion had withdrawn to the far end of a restaurant courtyard with the clear aim of being out of the public eye.

However, the Federal Court dismissed the remainder of her appeal on the ground that, as a figure of contemporary society “*par excellence*”, the applicant had to tolerate the publication of photos in which she appeared in a public place even if they were photos of scenes from her daily life and not photos showing her exercising her official functions. The public had a legitimate interest in knowing where the applicant was staying and how she behaved in public.

(d) Judgment of the Federal Constitutional Court of 15 December 1999

24. The applicant then appealed to the Federal Constitutional Court (*Bundesverfassungsgericht*), submitting that there had been an infringement of her right to the protection of her personality rights (Article 2 § 1 read in conjunction with Article 1 § 1 of the Basic Law).

In the applicant’s submission, the criteria established by the Federal Court of Justice regarding the protection of privacy in respect of photos taken in public places did not effectively protect the free development of the personality, be it in the context of private life or family life. Those criteria were so narrow that in practice the applicant could be photographed at any time outside her home and the photos subsequently published in the media.

Given that the photos were not used genuinely to inform people, but merely to entertain them, the right to control the use of one’s image in respect of scenes from private life, which had been recognised by the case-law of the Federal Constitutional Court, prevailed over the right – also guaranteed by the Basic Law – to freedom of the press.

25. In a landmark judgment of 15 December 1999, delivered after a hearing, the Constitutional Court allowed the applicant’s appeal in part on the ground that the publication of the three photos in issues nos. 32 and 34 of *Bunte* magazine, dated 5 August 1993 and 19 August 1993, featuring the applicant with her children had infringed her right to the protection of her personality rights guaranteed by Articles 2 § 1 and 1 § 1 of the Basic Law, reinforced by her right to family protection under Article 6 of the Basic Law. It referred the case to the Federal Court of Justice on that point. However, the Constitutional Court dismissed the applicant’s appeal regarding the other photos.

The relevant extract of the judgment reads as follows:

“The appeal is well-founded in part.

...

II.

The decisions being appealed do not fully satisfy the requirements of Article 2 § 1 read in conjunction with Article 1 § 1 of the Basic Law.

1. The provisions of sections 22 and 23 of the KUG [*Kunsturhebergesetz* – Copyright Act] on which the civil courts based their decisions in the present case are, however, compatible with the Basic Law.

Under Article 2 § 1 of the Basic Law, general personality rights are guaranteed only within the framework of the constitutional order. The provisions concerning the publication of photographic representations of persons listed in sections 22 and 23 of the KUG are part of that constitutional order. They derive from an incident which at the time caused a scandal (photos of Bismarck on his deathbed ...) and from the ensuing politico-legal debate sparked off by this incident ..., and aim to strike a fair balance between respect for personality rights and the community's interest in being informed ...

Under section 22, first sentence, of the KUG, pictures can only be disseminated or exposed to the public eye with the express approval of the person represented. Pictures relating to contemporary society are excluded from that rule under section 23(1) of the KUG ... Under section 23(2) of the KUG, however, that exception does not apply where the dissemination interferes with a legitimate interest of the person represented. The protection by degrees under these rules ensures that they take account of the need to protect the person being represented as well as the community's desire to be informed and the interest of the media which satisfy that desire. That much has already been established by the Federal Constitutional Court ...

...

(b) In the instant case regard must be had, in interpreting and applying sections 22 and 23 of the KUG, not only to general personality rights, but also to the freedom of the press guaranteed by Article 5 § 1, second sentence, of the Basic Law in so far as the provisions in question also affect those freedoms.

...

The fact that the press fulfils the function of forming public opinion does not exclude entertainment from the functional guarantee under the Basic Law. The formation of opinions and entertainment are not opposites. Entertainment also plays a role in the formation of opinions. It can sometimes even stimulate or influence the formation of opinions more than purely factual information. Moreover, there is a growing tendency in the media to do away with the distinction between information and entertainment both as regards press coverage generally and individual contributions, and to disseminate information in the form of entertainment or mix it with entertainment ('infotainment'). Consequently, many readers obtain information they consider to be important or interesting from entertaining coverage ...

Nor can mere entertainment be denied any role in the formation of opinions. That would amount to unilaterally presuming that entertainment merely satisfies a desire for amusement, relaxation, escapism or diversion. Entertainment can also convey images of reality and propose subjects for debate that spark off a process of discussion and assimilation relating to philosophies of life, values and behaviour models. In that respect, it fulfils important social functions ... When measured against the aim of

protecting press freedom, entertainment in the press is neither negligible nor entirely worthless and therefore falls within the scope of application of fundamental rights ...

The same is true of information about people. Personalisation is an important journalistic means of attracting attention. Very often it is this which first arouses interest in a problem and stimulates a desire for factual information. Similarly, interest in a particular event or situation is usually stimulated by personalised accounts. Additionally, celebrities embody certain moral values and lifestyles. Many people base their choice of lifestyle on their example. They become points of crystallisation for adoption or rejection and act as examples or counter-examples. This is what explains the public interest in the various ups and downs occurring in their lives.

As regards politicians, this public interest has always been deemed to be legitimate from the point of view of transparency and democratic control. Nor can it in principle be disputed that it exists in respect of other public figures. To that extent it is the function of the press to show people in situations that are not limited to specific functions or events and this also falls within the sphere of protection of press freedom. It is only when a balancing exercise has to be done between competing personality rights that an issue arises as to whether matters of essential interest for the public are involved and treated seriously and objectively or whether private matters, designed merely to satisfy the public's curiosity, are being disseminated ...

(c) The decision of the Federal Court of Justice largely stands up to an examination of its compatibility with the constitutional rules.

(aa) The Federal Court of Justice cannot be criticised under constitutional law for assessing the conditions of application [*Tatbestandsvoraussetzungen*] of section 23(1) no. 1 of the KUG according to the criterion of the community's interest in being informed and deciding on that basis that the photos showing the appellant outside her representative function in the Principality of Monaco were lawful.

Under section 23(1) no. 1 of the KUG, the publication of pictures portraying an aspect of contemporary society are exempted from the obligation to obtain the consent of the person concerned within the meaning of section 22 of the KUG. Judging from the drafting history of the Act ... and from the meaning and purpose of the words used, the provision in question takes into consideration the community's interest in being informed and the freedom of the press. Accordingly, the interpretation of this element [*Tatbestandsmerkmal*] must take account of the interests of the public. Pictures of people who are of no significance in contemporary society should not be made freely accessible to the public: they require the prior consent of the person concerned. The other element that is affected by fundamental rights, that of a 'legitimate interest' for the purposes of section 23(2) of the KUG, concerns only – and this must be stressed at the outset – figures of contemporary society and cannot therefore take sufficient account of the interests of the freedom of the press if these have previously been neglected when the circle of the persons concerned was defined.

It is in keeping with the importance and scope of the freedom of the press, and not unreasonably restrictive of the protection of personality rights, that the concept of contemporary society referred to in section 23(1) no. 1 of the KUG should not only cover, in accordance with a definition given by the courts, events of historical or political significance, but be defined on the basis of the public interest in being informed ... The kernel of press freedom and the free formation of opinions requires the press to have, within legal limits, sufficient margin of manoeuvre to allow it to

decide, in accordance with its publishing criteria, what the public interest demands, and the process of forming opinion to establish what amounts to a matter of public interest. As has been stated, entertaining coverage is no exception to these principles.

Nor should the Federal Court of Justice be criticised for including in the ‘domain of contemporary society’, within the meaning of section 23(1) no. 1 of the KUG, pictures of people who have not only aroused public interest at a certain point on the occasion of a particular historical event but who, on account of their status and importance, attract the public’s attention in general and not just on the odd occasion. Account should also be taken in this regard of the fact that, compared to the situation at the time the Copyright Act was passed, increased importance is given today to illustrated information. The concept of a ‘figure of contemporary society “*par excellence*”’ [‘*absolute*’ *Person der Zeitgeschichte*], often employed in this respect in the case-law and legal theory, does not conclusively derive from statute or the Constitution. If, as was done by the Court of Appeal and the Federal Court of Justice, it is interpreted as a shortened expression designating people whose image is deemed by the public to be worthy of respect out of consideration for the people concerned, it is irreproachable from the point of view of constitutional law at least as long as a balancing exercise is carried out, in the light of the circumstances of the case, between the public’s interest in being informed and the legitimate interests of the person concerned.

General personality rights do not require publications that are not subject to prior consent to be limited to pictures of figures of contemporary society in the exercise of their function in society. Very often the public interest aroused by such figures does not relate exclusively to the exercise of their function in the strict sense. It can, on the contrary, by virtue of the particular function and its impact, extend to information about the way in which these figures behave generally – that is, also outside their function – in public. The public has a legitimate interest in being allowed to judge whether the personal behaviour of the individuals in question, who are often regarded as idols or role models, convincingly tallies with their behaviour on their official engagements.

If, on the other hand, the right to publish pictures of people considered to be figures of contemporary society were to be limited to their official functions, insufficient account would be taken of the public interest properly aroused by such figures and this would, moreover, favour a selective presentation that would deprive the public of certain necessary judgmental possibilities in respect of figures of socio-political life, having regard to the function of role model of such figures and the influence they exert. The press is not, however, allowed to use every picture of figures of contemporary society. On the contrary, section 23(2) of the KUG gives the courts adequate opportunity to apply the protective provisions of Article 2 § 1 read in conjunction with Article 1 § 1 of the Basic Law ...

(bb) In theory the criteria established by the Federal Court of Justice for interpreting the concept of ‘legitimate interest’ used in section 23(2) of the KUG are irreproachable from the point of view of constitutional law.

According to the decision being appealed, the privacy meriting protection that must also be afforded to ‘figures of contemporary society “*par excellence*”’ presupposes that they have retired to a secluded place with the objectively recognisable aim of being alone and where, confident of being alone, they behave in a manner in which they would not behave in public. The Federal Court of Justice accepted that there had

been a breach of sections 22 and 23 of the KUG where this type of picture was taken secretly or by catching the person unawares.

The criterion of a secluded place takes account of the aim, pursued by the general right to protection of personality rights, of allowing the individual a sphere, including outside the home, in which he does not feel himself to be the subject of permanent public attention – and relieves him of the obligation of behaving accordingly – and in which he can relax and enjoy some peace and quiet. This criterion does not excessively restrict press freedom because it does not impose a blanket ban on pictures of the daily or private life of figures of contemporary society, but allows them to be shown where they have appeared in public. In the event of an overriding public interest in being informed, the freedom of the press can even, in accordance with that case-law authority, be given priority over the protection of the private sphere ...

The Federal Court of Justice properly held that it is legitimate to draw conclusions from the behaviour adopted in a given situation by an individual who is clearly in a secluded spot. However, the protection against dissemination of photos taken in that context does not only apply where the individual behaves in a manner in which he would not behave in public. On the contrary, the development of the personality cannot be properly protected unless, irrespective of his behaviour, the individual has a space in which he can relax without having to tolerate the presence of photographers or cameramen. That is not in issue here, however, since, according to the findings on which the Federal Court of Justice based its decision, the first of the conditions to which protection of private life is subject has not been met.

Lastly, there is nothing unconstitutional, when balancing the public interest in being informed against the protection of private life, in attaching importance to the method used to obtain the information in question ... It is doubtful, however, that the mere fact of photographing the person secretly or catching them unawares can be deemed to infringe their privacy outside the home. Having regard to the function attributed to that privacy under constitutional law and to the fact that it is usually impossible to determine from a photo whether the person has been photographed secretly or caught unawares, the existence of unlawful interference with that privacy cannot in any case be made out merely because the photo was taken in those conditions. As, however, the Federal Court of Justice has already established in respect of the photographs in question that the appellant was not in a secluded place, the doubts expressed above have no bearing on the review of its decision.

(cc) However, the constitutional requirements have not been satisfied in so far as the decisions of which the appellant complains did not take account of the fact that the right to protection of personality rights of persons in the appellant's situation is strengthened by Article 6 of the Basic Law regarding those persons' intimate relations with their children.

(dd) The following conclusions can be drawn from the foregoing considerations with regard to the photographs in question:

The decision of the Federal Court of Justice cannot be criticised under constitutional law regarding the photos of the appellant at a market, doing her shopping at a market accompanied by her bodyguard or dining with a male companion at a well-attended restaurant. The first two cases concerned an open location frequented by the general public. The third case admittedly concerned a well-circumscribed location, spatially speaking, but one in which the appellant was exposed to the other people present. It is

for this reason, moreover, that the Federal Court of Justice deemed it legitimate to ban photos showing the appellant in a restaurant garden, which were the subject of the decision being appealed but are not the subject of the constitutional appeal. The presence of the appellant and her companion there presented all the features of seclusion. The fact that the photographs in question were evidently taken from a distance shows that the appellant could legitimately have assumed that she was not exposed to public view.

Nor can the decision being appealed be criticised regarding the photos of the appellant alone on horseback or riding a bicycle. In the Federal Court of Justice's view, the appellant had not been in a secluded place, but in a public one. That finding cannot attract criticism under constitutional law. The appellant herself describes the photos in question as belonging to the intimacy of her private sphere merely because they manifest her desire to be alone. In accordance with the criteria set out above, the mere desire of the person concerned is not relevant in any way.

The three photos of the appellant with her children require a fresh examination, however, in the light of the constitutional rules set out above. We cannot rule out the possibility that the review that needs to be carried out in the light of the relevant criteria will lead to a different result for one or other or all the photos. The decision must therefore be set aside in that respect and remitted to the Federal Court of Justice for a fresh decision.

(d) The decisions of the Regional Court and the Court of Appeal resulted in a violation of fundamental rights by limiting to the home the privacy protected by Article 2 § 1 read in conjunction with Article 1 § 1 of the Basic Law in accordance, moreover, with a rationale that was in keeping with the case-law at the time. The decisions in question do not need to be set aside, however, since the violation complained of has been remedied in part by the Federal Court of Justice and the remainder of the case remitted to that court.

...”

(e) Sequel to the proceedings

26. Following the remittal of the case to the Federal Court of Justice in connection with the three photos that had appeared in *Bunte* magazine (issue no. 32 of 5 August 1993 and no. 34 of 19 August 1993) showing the applicant with her children, the Burda publishing company undertook not to republish the photos (*Unterlassungserklärung*).

2. The second set of proceedings

(a) Judgment of the Hamburg Regional Court of 26 September 1997

27. On 14 May 1997 the applicant reapplied to the Hamburg Regional Court, seeking an injunction preventing the Burda publishing company from republishing the second series of photos on the ground that they infringed her right to protection of her personality rights, guaranteed by Articles 2 § 1

and 1 § 1 of the Basic Law, and her right to protection of her private life and to the control of the use of her image, guaranteed by sections 22 et seq. of the Copyright Act.

28. In a judgment of 26 September 1997, the Hamburg Regional Court rejected the application, referring in particular to the grounds of the Federal Court of Justice's judgment of 19 December 1995.

(b) Judgment of the Hamburg Court of Appeal of 10 March 1998

29. The applicant appealed against that judgment.

30. In a judgment of 10 March 1998, the Hamburg Court of Appeal dismissed the applicant's appeal for the same reasons.

(c) Decision of the Federal Constitutional Court of 4 April 2000

31. As the Court of Appeal did not grant leave to appeal on points of law to the Federal Court of Justice, the applicant lodged a constitutional appeal directly with the Federal Constitutional Court, relying on her earlier submissions.

32. In a decision of 4 April 2000, the Federal Constitutional Court, ruling as a panel of three judges, refused to entertain the appeal. It referred in particular to the Federal Court of Justice's judgment of 19 December 1995 and to its own landmark judgment of 15 December 1999.

3. The third set of proceedings

(a) Judgment of the Hamburg Regional Court of 24 April 1998

33. On 5 November 1997 the applicant reapplied to the Hamburg Regional Court, seeking an injunction preventing the Heinrich Bauer publishing company from republishing the third series of photos on the ground that they infringed her right to protection of her personality rights, guaranteed by Articles 2 § 1 and 1 § 1 of the Basic Law, and the right to protection of her private life and to the control of the use of her image, guaranteed by sections 22 et seq. of the Copyright (Arts Domain) Act.

The applicant submitted, among other things, a sworn attestation by the director of the Monte Carlo Beach Club to the effect that the swimming baths in question were a private establishment, access to which was subject to a high fee and strictly controlled and from which journalists and photographers were debarred unless they had the express permission of the owner of the establishment. The fact that the photos were very blurred showed that they had been taken secretly, at a distance of several hundred metres, from the window or roof of a neighbouring house.

34. In a judgment of 24 April 1998, the Hamburg Regional Court rejected the application, referring in particular to the grounds of the Federal Court of Justice's judgment of 19 December 1995. The court stated that the

Monte Carlo Beach Club had to be considered as an open-air swimming pool that was open to the public, even if an entry fee was charged and access restricted.

(b) Judgment of the Hamburg Court of Appeal of 13 October 1998

35. The applicant appealed against that judgment.

36. In a judgment of 13 October 1998, the Hamburg Court of Appeal dismissed the applicant's appeal for the same reasons.

The Court of Appeal found that a swimming pool or beach was not a secluded place and that the photos showing the applicant tripping over an obstacle and falling down were not such as to denigrate or demean her in the public's eyes.

(c) The decision of the Federal Constitutional Court of 13 April 2000

37. As the Court of Appeal did not grant the applicant leave to appeal on points of law to the Federal Court of Justice, the applicant lodged a constitutional appeal directly with the Federal Constitutional Court, relying on her earlier submissions.

38. In a decision of 13 April 2000, the Federal Constitutional Court, ruling as a panel of three judges, refused to entertain the appeal. It referred in particular to the Federal Court of Justice's judgment of 19 December 1995 and to its own landmark judgment of 15 December 1999.

The Constitutional Court held that the ordinary courts had properly found that the Monte Carlo Beach Club was not a secluded place and that the photos of the applicant wearing a swimsuit and falling down were not capable of constituting an infringement of her right to respect for her private life.

II. RELEVANT DOMESTIC AND EUROPEAN LAW

A. The Basic Law

39. The relevant provisions of the Basic Law are worded as follows:

Article 1 § 1

"The dignity of human beings is inviolable. All public authorities have a duty to respect and protect it."

Article 2 § 1

"Everyone shall have the right to the free development of their personality provided that they do not interfere with the rights of others or violate the constitutional order or moral law [*Sittengesetz*]."

Article 5 §§ 1 and 2

“1. Everyone shall have the right freely to express and disseminate his or her opinions in speech, writing and pictures and freely to obtain information from generally accessible sources. Freedom of the press and freedom of reporting on the radio and in films shall be guaranteed. There shall be no censorship.

2. These rights shall be subject to the limitations laid down by the provisions of the general laws and by statutory provisions aimed at protecting young people and to the obligation to respect personal honour [*Recht der persönlichen Ehre*].”

Article 6 §§ 1 and 2

“1. Marriage and the family enjoy the special protection of the State.

2. The care and upbringing of children is the natural right of parents and a duty primarily incumbent on them. The State community shall oversee the performance of that duty.”

B. The Copyright (Arts Domain) Act

40. Section 22(1) of the Copyright (Arts Domain) Act provides that images can only be disseminated with the express approval of the person concerned.

41. Section 23(1) no. 1 of that Act provides for exceptions to that rule, particularly where the images portray an aspect of contemporary society (*Bildnisse aus dem Bereich der Zeitgeschichte*) on condition that publication does not interfere with a legitimate interest (*berechtigtes Interesse*) of the person concerned (section 23(2)).

C. Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy

42. The full text of this resolution, adopted by the Parliamentary Assembly on 26 June 1998, is worded as follows:

“1. The Assembly recalls the current affairs debate it held on the right to privacy during its September 1997 session, a few weeks after the accident which cost the Princess of Wales her life.

2. On that occasion, some people called for the protection of privacy, and in particular that of public figures, to be reinforced at the European level by means of a convention, while others believed that privacy was sufficiently protected by national legislation and the European Convention on Human Rights, and that freedom of expression should not be jeopardised.

3. In order to explore the matter further, the Committee on Legal Affairs and Human Rights organised a hearing in Paris on 16 December 1997 with the participation of public figures or their representatives and the media.

4. The right to privacy, guaranteed by Article 8 of the European Convention on Human Rights, has already been defined by the Assembly in the declaration on mass communication media and human rights, contained within Resolution 428 (1970), as ‘the right to live one’s own life with a minimum of interference’.

5. In view of the new communication technologies which make it possible to store and use personal data, the right to control one’s own data should be added to this definition.

6. The Assembly is aware that personal privacy is often invaded, even in countries with specific legislation to protect it, as people’s private lives have become a highly lucrative commodity for certain sectors of the media. The victims are essentially public figures, since details of their private lives serve as a stimulus to sales. At the same time, public figures must recognise that the special position they occupy in society - in many cases by choice - automatically entails increased pressure on their privacy.

7. Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain.

8. It is often in the name of a one-sided interpretation of the right to freedom of expression, which is guaranteed in Article 10 of the European Convention on Human Rights, that the media invade people’s privacy, claiming that their readers are entitled to know everything about public figures.

9. Certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts.

10. It is therefore necessary to find a way of balancing the exercise of two fundamental rights, both of which are guaranteed by the European Convention on Human Rights: the right to respect for one’s private life and the right to freedom of expression.

11. The Assembly reaffirms the importance of every person’s right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value.

12. However, the Assembly points out that the right to privacy afforded by Article 8 of the European Convention on Human Rights should not only protect an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media.

13. The Assembly believes that, since all member states have now ratified the European Convention on Human Rights, and since many systems of national legislation comprise provisions guaranteeing this protection, there is no need to propose that a new convention guaranteeing the right to privacy should be adopted.

14. The Assembly calls upon the governments of the member states to pass legislation, if no such legislation yet exists, guaranteeing the right to privacy containing the following guidelines, or if such legislation already exists, to supplement it with these guidelines:

(i) the possibility of taking an action under civil law should be guaranteed, to enable a victim to claim possible damages for invasion of privacy;

(ii) editors and journalists should be rendered liable for invasions of privacy by their publications, as they are for libel;

(iii) when editors have published information that proves to be false, they should be required to publish equally prominent corrections at the request of those concerned;

(iv) economic penalties should be envisaged for publishing groups which systematically invade people's privacy;

(v) following or chasing persons to photograph, film or record them, in such a manner that they are prevented from enjoying the normal peace and quiet they expect in their private lives or even such that they are caused actual physical harm, should be prohibited;

(vi) a civil action (private lawsuit) by the victim should be allowed against a photographer or a person directly involved, where paparazzi have trespassed or used 'visual or auditory enhancement devices' to capture recordings that they otherwise could not have captured without trespassing;

(vii) provision should be made for anyone who knows that information or images relating to his or her private life are about to be disseminated to initiate emergency judicial proceedings, such as summary applications for an interim order or an injunction postponing the dissemination of the information, subject to an assessment by the court as to the merits of the claim of an invasion of privacy;

(viii) the media should be encouraged to create their own guidelines for publication and to set up an institute with which an individual can lodge complaints of invasion of privacy and demand that a rectification be published.

15. It invites those governments which have not yet done so to ratify without delay the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

16. The Assembly also calls upon the governments of the member states to:

(i) encourage the professional bodies that represent journalists to draw up certain criteria for entry to the profession, as well as standards for self-regulation and a code of journalistic conduct;

(ii) promote the inclusion in journalism training programmes of a course in law, highlighting the importance of the right to privacy *vis-à-vis* society as a whole;

(iii) foster the development of media education on a wider scale, as part of education about human rights and responsibilities, in order to raise media users' awareness of what the right to privacy necessarily entails;

(iv) facilitate access to the courts and simplify the legal procedures relating to press offences, in order to ensure that victims' rights are better protected."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

43. The applicant submitted that the German court decisions had infringed her right to respect for her private and family life, guaranteed by Article 8 of the Convention, which is worded as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Submissions of the parties and interveners

1. The applicant

44. The applicant stated that she had spent more than ten years in unsuccessful litigation in the German courts trying to establish her right to the protection of her private life. She alleged that as soon as she left her house she was constantly hounded by paparazzi who followed her every daily movement, be it crossing the road, fetching her children from school, doing her shopping, out walking, engaging in sport or going on holiday. In her submission, the protection afforded to the private life of a public figure like herself was minimal under German law because the concept of a "secluded place" as defined by the Federal Court of Justice and the Federal Constitutional Court was much too narrow in that respect. Furthermore, in order to benefit from that protection the onus was on her to establish every time that she had been in a secluded place. She was thus deprived of any privacy and could not move about freely without being a target for the

paparazzi. She affirmed that in France her prior agreement was necessary for the publication of any photos not showing her at an official event. Such photos were regularly taken in France and then sold and published in Germany. The protection of private life from which she benefited in France was therefore systematically circumvented by virtue of the decisions of the German courts. On the subject of the freedom of the press, the applicant stated that she was aware of the essential role played by the press in a democratic society in terms of informing and forming public opinion, but in her case it was just the entertainment press seeking to satisfy its readers' voyeuristic tendencies and make huge profits from generally innocuous photos showing her going about her daily business. Lastly, the applicant stressed that it was materially impossible to establish in respect of every photo whether or not she had been in a secluded place. As the judicial proceedings were generally held several months after publication of the photos, she was obliged to keep a permanent record of her every movement in order to protect herself from paparazzi who might photograph her. With regard to many of the photos that were the subject of this application, it was impossible to determine the exact time and place at which they had been taken.

2. *The Government*

45. The Government submitted that German law, while taking account of the fundamental role of the freedom of the press in a democratic society, contained sufficient safeguards to prevent any abuse and ensure the effective protection of the private life of even public figures. In their submission, the German courts had in the instant case struck a fair balance between the applicant's rights to respect for her private life guaranteed by Article 8 and the freedom of the press guaranteed by Article 10, having regard to the margin of appreciation available to the State in this area. The courts had found in the first place that the photos had not been taken in a secluded place and had, subsequently, examined the limits on the protection of private life, particularly in the light of the freedom of the press and even where the publication of photos by the entertainment press was concerned. The protection of the private life of a figure of contemporary society "*par excellence*" did not require the publication of photos without his or her authorisation to be limited to showing the person in question engaged in their official duties. The public had a legitimate interest in knowing how the person behaved generally in public. The Government submitted that this definition of the freedom of the press by the Federal Constitutional Court was compatible with Article 10 and the European Court's relevant case-law. Furthermore, the concept of a secluded place was only one factor, albeit an important one, of which the domestic courts took account when balancing the protection of private life against the freedom of the press. Accordingly, while private life was less well protected where a public figure was

photographed in a public place, other factors could also be taken into consideration, such as the nature of the photos, for example, which should not shock the public. Lastly, the Government observed that the decision of the Federal Court of Justice – which had held that the publication of photos of the applicant with the actor Vincent Lindon in a restaurant courtyard in Saint-Rémy-de-Provence were unlawful – showed that the applicant's private life was protected even outside her home.

3. *The interveners*

46. The Association of German Magazine Publishers submitted that German law, which was halfway between French law and United Kingdom law, struck a fair balance between the right to protection of private life and the freedom of the press. In its submission, it also complied with the principles set out in Resolution 1165 of the Parliamentary Assembly of the Council of Europe on the right to privacy and the European Court's case-law, which had always stressed the fundamental role of the press in a democratic society. The public's legitimate interest in being informed was not limited to politicians, but extended to public figures who had become known for other reasons. The press's role of "watchdog" could not be narrowly interpreted here. In that connection, account should also be taken of the fact that the boundary between political commentary and entertainment was becoming increasingly blurred. Given that there was no uniform European standard concerning the protection of private life, the State had a wide margin of appreciation in this area.

47. Burda joined the observations of the Association of German Magazine Publishers and stated that German law required the courts to balance the competing interests of informing the public and protecting the right to control the use of one's image very strictly and on a case-by-case basis. Even figures of contemporary society "*par excellence*" enjoyed a not inconsiderable degree of protection, and recent case-law had even tended towards reinforcing that protection. Since the death of her mother in 1982, the applicant had officially been First Lady of the reigning family in Monaco and was as such an example for the public (*Vorbildfunktion*). Moreover, the Grimaldi family had always sought to attract media attention and was therefore itself responsible for the public interest in it. The applicant could not therefore, especially if account were taken of her official functions, be regarded as a victim of the press. The publication of the photos in question had not infringed her right to control the use of her image because they had been taken while she was in public and had not been damaging to her reputation.

B. The Court's assessment

1. *As regards the subject of the application*

48. The Court notes at the outset that the photos of the applicant with her children are no longer the subject of this application, as it stated in its admissibility decision of 8 July 2003.

The same applies to the photos published in *Freizeit Revue* magazine (issue no. 30 of 22 July 1993) showing the applicant with Vincent Lindon at the far end of a restaurant courtyard in Saint-Rémy-de-Provence (see paragraph 11 above). In its judgment of 19 December 1995, the Federal Court of Justice prohibited any further publication of the photos on the ground that they infringed the applicant's right to respect for her private life (see paragraph 23 above).

49. Accordingly, the Court considers it important to specify that the present application concerns the following photos, which were published as part of a series of articles about the applicant:

(i) the photo published in *Bunte* magazine (issue no. 32 of 5 August 1993) showing the applicant on horseback (see paragraph 12 above)

(ii) the photos published in *Bunte* magazine (issue no. 34 of 19 August 1993) showing the applicant shopping on her own; with Mr Vincent Lindon in a restaurant; alone on a bicycle; and with her bodyguard at a market (see paragraph 13 above);

(iii) the photos published in *Bunte* magazine (issue no. 10 of 27 February 1997) showing the applicant on a skiing holiday in Austria (see paragraph 14 above);

(iv) the photos published in *Bunte* magazine (issue no. 12 of 13 March 1997) showing the applicant with Prince Ernst August von Hannover and alone leaving her Parisian residence (see paragraph 15 above);

(v) the photos published in *Bunte* magazine (issue no. 16 of 10 April 1997) showing the applicant playing tennis with Prince Ernst August von Hannover and both of them putting their bicycles down (see paragraph 16 above);

(vi) the photos published in *Neue Post* magazine (issue no. 35/97) showing the applicant tripping over an obstacle at the Monte Carlo Beach Club (see paragraph 17 above).

2. *Applicability of Article 8*

50. The Court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's name (see *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24), or a person's picture (see *Schüssel v. Austria* (dec.), no. 42409/98, 21 February 2002).

Furthermore, private life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings (see, *mutatis mutandis*, *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, § 29, and *Botta v. Italy*, judgment of 24 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 422, § 32). There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" (see, *mutatis mutandis*, *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 56, ECHR 2001-IX, and *Peck v. the United Kingdom*, no. 44647/98, § 57, ECHR 2003-I).

51. The Court has also indicated that, in certain circumstances, a person has a "legitimate expectation" of protection and respect for his or her private life. Accordingly, it has held in a case concerning the interception of telephone calls on business premises that the applicant "would have had a reasonable expectation of privacy for such calls" (see *Halford v. the United Kingdom*, judgment of 25 June 1997, *Reports* 1997-III, p. 1016, § 45).

52. As regards photos, with a view to defining the scope of the protection afforded by Article 8 against arbitrary interference by public authorities, the European Commission of Human Rights had regard to whether the photographs related to private or public matters and whether the material thus obtained was envisaged for a limited use or was likely to be made available to the general public (see, *mutatis mutandis*, *Friedl v. Austria*, judgment of 31 January 1995, Series A no. 305-B, opinion of the Commission, p. 21, §§ 49-52; *P.G. and J.H. v. the United Kingdom*, cited above, § 58; and *Peck*, cited above, § 61).

53. In the present case there is no doubt that the publication by various German magazines of photos of the applicant in her daily life either on her own or with other people falls within the scope of her private life.

3. Compliance with Article 8

(a) The domestic courts' position

54. The Court notes that, in its landmark judgment of 15 December 1999, the Federal Constitutional Court interpreted sections 22 and 23 of the Copyright (Arts Domain) Act (see paragraphs 40-41 above) by balancing the requirements of the freedom of the press against those of the protection of private life, that is, the public interest in being informed against the legitimate interests of the applicant. In doing so the Federal Constitutional Court took account of two criteria under German law, one functional and the other spatial. It considered that the applicant, as a figure of contemporary society "*par excellence*", enjoyed the protection of her private life even outside her home but only if she was in a secluded place out of the

public eye to which persons retire “with the objectively recognisable aim of being alone and where, confident of being alone, they behave in a manner in which they would not behave in public”. In the light of those criteria, the Federal Constitutional Court held that the Federal Court of Justice’s judgment of 19 December 1995 regarding publication of the photos in question was compatible with the Basic Law. The court attached decisive weight to the freedom of the press, even the entertainment press, and to the public interest in knowing how the applicant behaved outside her representative functions (see paragraph 25 above).

55. Referring to its landmark judgment, the Federal Constitutional Court did not entertain the applicant’s appeals in the subsequent proceedings brought by her (see paragraphs 32 and 38 above).

(b) General principles governing the protection of private life and the freedom of expression

56. In the present case the applicant did not complain of an action by the State, but rather of the lack of adequate State protection of her private life and her image.

57. The Court reiterates that, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see, *mutatis mutandis*, *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 23; *Stjerna v. Finland*, judgment of 25 November 1994, Series A no. 299-B, pp. 60-61, § 38; and *Verliere v. Switzerland* (dec.), no. 41953/98, ECHR 2001-VII). That also applies to the protection of a person’s picture against abuse by others (see *Schüssel*, cited above).

The boundary between the State’s positive and negative obligations under this provision does not lend itself to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, among many other authorities, *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 19, § 49, and *Botta*, cited above, p. 427, § 33).

58. That protection of private life has to be balanced against the freedom of expression guaranteed by Article 10 of the Convention.

In that context, the Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or

“ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society” (see *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 23, § 49).

In that connection, the press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see, among many authorities, *Observer and Guardian v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216, pp. 29-30, § 59, and *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 59, ECHR 1999-III). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38; *Tammer v. Estonia*, no. 41205/98, §§ 59-63, ECHR 2001-I; and *Prisma Presse v. France* (dec.), nos. 66910/01 and 71612/01, 1 July 2003).

59. Although freedom of expression also extends to the publication of photos, this is an area in which the protection of the rights and reputation of others takes on particular importance. The present case does not concern the dissemination of “ideas”, but of images containing very personal or even intimate “information” about an individual. Furthermore, photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution.

60. In the cases in which the Court has had to balance the protection of private life against freedom of expression, it has always stressed the contribution made by photos or articles in the press to a debate of general interest (see, as a recent authority, *Tammer*, cited above, §§ 59 et seq.; *News Verlags GmbH & Co. KG v. Austria*, no. 31457/96, §§ 52 et seq., ECHR 2000-I; and *Krone Verlag GmbH & Co. KG v. Austria*, no. 34315/96, §§ 33 et seq., 26 February 2002). The Court thus found, in one case, that the use of certain terms in relation to an individual’s private life was not “justified by considerations of public concern” and that those terms did not “[bear] on a matter of general importance” (see *Tammer*, cited above, § 68) and went on to hold that there had not been a violation of Article 10. In another case, however, the Court attached particular importance to the fact that the subject in question was a news item of “major public concern” and that the published photographs “did not disclose any details of [the] private life” of the person in question (see *Krone Verlag GmbH & Co. KG*, cited above, § 37) and held that there had been a violation of Article 10. Similarly, in a recent case concerning the publication by President Mitterrand’s former private doctor of a book containing revelations about the President’s state of

health, the Court held that “the more time that elapsed, the more the public interest in discussion of the history of President Mitterrand’s two terms of office prevailed over the requirements of protecting the President’s rights with regard to medical confidentiality” (see *Editions Plon v. France*, no. 58148/00, § 53, ECHR 2004-IV) and held that there had been a breach of Article 10.

(c) Application of these general principles by the Court

61. The Court notes at the outset that in the present case the photos of the applicant in the various German magazines show her in scenes from her daily life, thus involving activities of a purely private nature such as engaging in sport, out walking, leaving a restaurant or on holiday. The photos, in which the applicant appears sometimes alone and sometimes in company, illustrate a series of articles with such innocuous titles as “Pure happiness”, “Caroline... a woman returning to life”, “Out and about with Princess Caroline in Paris” and “The kiss. Or: they are not hiding anymore” (see paragraphs 11-17 above).

62. The Court also notes that the applicant, as a member of the Prince of Monaco’s family, represents the ruling family at certain cultural or charitable events. However, she does not exercise any function within or on behalf of the State of Monaco or any of its institutions (see paragraph 8 above).

63. The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of “watchdog” in a democracy by contributing to “impart[ing] information and ideas on matters of public interest (see *Observer and Guardian*, loc. cit.), it does not do so in the latter case.

64. Similarly, although the public has a right to be informed, which is an essential right in a democratic society that, in certain special circumstances, can even extend to aspects of the private life of public figures, particularly where politicians are concerned (see *Editions Plon*, loc. cit.), this is not the case here. The situation here does not come within the sphere of any political or public debate because the published photos and accompanying commentaries relate exclusively to details of the applicant’s private life.

65. As in other similar cases it has examined, the Court considers that the publication of the photos and articles in question, the sole purpose of which was to satisfy the curiosity of a particular readership regarding the details of the applicant’s private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the

public (see, *mutatis mutandis*, *Campmany y Diez de Revenga and Lopez Galiacho Perona v. Spain* (dec.), no. 54224/00, ECHR 2000-XII; *Julio Bou Gibert and El Hogar Y La Moda J.A. v. Spain* (dec.), no. 14929/02, 13 May 2003; and *Prisma Presse*, cited above).

66. In these conditions freedom of expression calls for a narrower interpretation (see *Prisma Presse*, cited above, and, by converse implication, *Krone Verlag GmbH & Co. KG*, cited above, § 37).

67. In that connection, the Court also takes account of the resolution of the Parliamentary Assembly of the Council of Europe on the right to privacy, which stresses the “one-sided interpretation of the right to freedom of expression” by certain media which attempt to justify an infringement of the rights protected by Article 8 of the Convention by claiming that “their readers are entitled to know everything about public figures” (see paragraph 42 above, and *Prisma Presse*, cited above).

68. The Court finds another point to be of importance: even though, strictly speaking, the present application concerns only the publication of the photos and articles by various German magazines, the context in which these photos were taken – without the applicant’s knowledge or consent – and the harassment endured by many public figures in their daily lives cannot be fully disregarded (see paragraph 59 above).

In the present case this point is illustrated in particularly striking fashion by the photos taken of the applicant at the Monte Carlo Beach Club tripping over an obstacle and falling down (see paragraph 17 above). It appears that these photos were taken secretly at a distance of several hundred metres, probably from a neighbouring house, whereas journalists’ and photographers’ access to the club was strictly regulated (see paragraph 33 above).

69. The Court reiterates the fundamental importance of protecting private life from the point of view of the development of every human being’s personality. That protection – as stated above – extends beyond the private family circle and also includes a social dimension. The Court considers that anyone, even if they are known to the general public, must be able to enjoy a “legitimate expectation” of protection of and respect for their private life (see paragraph 51 above and, *mutatis mutandis*, *Halford*, cited above, p. 1016, § 45).

70. Furthermore, increased vigilance in protecting private life is necessary to contend with new communication technologies which make it possible to store and reproduce personal data (see point 5 of the Parliamentary Assembly’s resolution on the right to privacy, paragraph 42 above, and, *mutatis mutandis*, *Amann v. Switzerland* [GC], no. 27798/95, §§ 65-67, ECHR 2000-II; *Rotaru v. Romania* [GC], no. 28341/95, §§ 43-44, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, cited above, §§ 57-60; and *Peck*, cited above, §§ 59-63 and 78). This also applies to the

systematic taking of specific photos and their dissemination to a broad section of the public.

71. Lastly, the Court reiterates that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, pp. 15-16, § 33).

72. The Court finds it hard to agree with the domestic courts' interpretation of section 23(1) of the Copyright (Arts Domain) Act, which consists in describing a person as such as a figure of contemporary society "*par excellence*". Since that definition affords the person very limited protection of their private life or the right to control the use of their image, it could conceivably be appropriate for politicians exercising official functions. However, it cannot be justified for a "private" individual, such as the applicant, in whom the interest of the general public and the press is based solely on her membership of a reigning family, whereas she herself does not exercise any official functions.

In any event the Court considers that, in these conditions, the Act has to be interpreted narrowly to ensure that the State complies with its positive obligation under the Convention to protect private life and the right to control the use of one's image.

73. Lastly, the distinction drawn between figures of contemporary society "*par excellence*" and "relatively" public figures has to be clear and obvious so that, in a State governed by the rule of law, the individual has precise indications as to the behaviour he or she should adopt. Above all, they need to know exactly when and where they are in a protected sphere or, on the contrary, in a sphere in which they must expect interference from others, especially the tabloid press.

74. The Court therefore considers that the criteria on which the domestic courts based their decisions were not sufficient to protect the applicant's private life effectively. As a figure of contemporary society "*par excellence*" she cannot – in the name of freedom of the press and the public interest – rely on protection of her private life unless she is in a secluded place out of the public eye and, moreover, succeeds in proving it (which can be difficult). Where that is not the case, she has to accept that she might be photographed at almost any time, systematically, and that the photos are then very widely disseminated even if, as was the case here, the photos and accompanying articles relate exclusively to details of her private life.

75. In the Court's view, the criterion of spatial isolation, although apposite in theory, is in reality too vague and difficult for the person concerned to determine in advance. In the present case, merely classifying the applicant as a figure of contemporary society "*par excellence*" does not suffice to justify such an intrusion into her private life.

(d) Conclusion

76. As the Court has stated above, it considers that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution, since the applicant exercises no official function and the photos and articles related exclusively to details of her private life.

77. Furthermore, the Court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public.

Even if such a public interest exists, as does a commercial interest of the magazines in publishing these photos and these articles, in the instant case those interests must, in the Court's view, yield to the applicant's right to the effective protection of her private life.

78. Lastly, in the Court's opinion the criteria established by the domestic courts were not sufficient to ensure the effective protection of the applicant's private life and she should, in the circumstances of the case, have had a "legitimate expectation" of protection of her private life.

79. Having regard to all the foregoing factors, and despite the margin of appreciation afforded to the State in this area, the Court considers that the German courts did not strike a fair balance between the competing interests.

80. There has therefore been a breach of Article 8 of the Convention.

81. Having regard to that finding, the Court does not consider it necessary to rule on the applicant's complaint relating to her right to respect for her family life.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

83. The applicant claimed 50,000 euros (EUR) for non-pecuniary damage on the ground that the German courts' decisions prevented her from leading a normal life with her children without being hounded by the media. She also claimed EUR 142,851.31 in reimbursement of her costs and expenses for the many sets of proceedings she had had to bring in the German courts.

84. The Government contested the amounts claimed. As regards non-pecuniary damage, they reiterated that, under German law, the applicant enjoyed protection of her private life even outside her home, particularly where her children were concerned. With regard to costs and expenses, they submitted that not all the proceedings could be taken into account, that the value of parts of the subject matter was less than the amount stated, and that the legal fees being claimed, in view of the amount concerned, could not be reimbursed.

85. The Court considers that the question of the application of Article 41 is not ready for decision. Accordingly, it shall be reserved and the subsequent procedure fixed having regard to any agreement which might be reached between the Government and the applicant.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;
2. *Holds* that the question of the application of Article 41 is not ready for decision; and accordingly,
 - (a) *reserves* the said question in whole;
 - (b) *invites* the Government and the applicant to submit, within six months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, their written observations on the matter and, in particular, to notify the Court of any agreement that they may reach;
 - (c) *reserves* the further procedure and *delegates* to the President of the Chamber the power to fix the same if need be.

Done in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 June 2004.

Vincent BERGER
Registrar

Ireneu CABRAL BARRETO
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Mr Cabral Barreto;
- (b) concurring opinion of Mr Zupančič.

I.C.B.
V.B.

CONCURRING OPINION OF JUDGE CABRAL BARRETO

(Translation)

I am of the opinion that there has been a violation of Article 8 of the Convention, but am unable to follow the entire reasoning of the majority.

1. My colleagues state in their conclusions that “the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest” and that “the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and she is well known to the public”.

In the majority’s view the publication of the photos and articles in question was not such as to contribute to a debate of general interest because the applicant was not performing official functions and the published photos and accompanying commentaries related exclusively to details of her private life.

In my view, however, the applicant is a public figure and the public does have a right to be informed about her life.

The solution therefore needs to be found in the fair balance that has to be struck between the applicant’s right to her private life and the public’s right to be informed.

2. The applicant is a public figure, even if she does not perform any function within or on behalf of the State of Monaco or any of its institutions.

“Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain” – paragraph 7 of Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy (see paragraph 42 of the judgment).

It is well known that the applicant has for years played a role in European public life, even if she does not perform any official functions in her own country.

To measure the degree of public interest in her, it is sufficient to look at the amount of media coverage devoted to her public or private life.

Very recently the press drew attention to the fact that, on her arrival at the ceremony of the marriage of Crown Prince Felipe of Spain, the applicant was one of the people from Europe’s and the world’s high society to be the most widely greeted by the public.

The applicant is, in my view, a public figure and information about her life contributes to a debate of general interest.

The general interest does not have to be limited to political debate. As pointed out by the Parliamentary Assembly, “certain facts relating to the

private lives of public figures, particularly politicians, may indeed be of interest to citizens ...”.

If that is true of politicians it is also true of all other public figures in whom the public takes an interest.

It is therefore necessary to strike a balance between two fundamental rights: the right of public figures to respect for their private life and everyone’s right to freedom of expression, which embraces the right of the public to be informed.

I agree with the majority that the private life of a public figure does not stop at their front door.

However, it has to be acknowledged that, in view of their fame, a public figure’s life outside their home, and particularly in public places, is inevitably subject to certain constraints.

Fame and public interest inevitably give rise to a difference in treatment of the private life of an ordinary person and that of a public figure.

As the Federal Constitutional Court pointed out, “the public has a legitimate interest in being allowed to judge whether the personal behaviour of the individuals in question, who are often regarded as idols or role models, convincingly tallies with their behaviour on their official engagements”.

Admittedly, determining the limit of a public figure’s private life is no easy task.

Furthermore, a strict criterion might lead to solutions that do not correspond to the “nature of things”.

It is clear that if the person is in an isolated spot everything that happens there must be covered by the protection of private life.

It appears to me, however, that the criterion of spatial isolation used by the German courts is very restrictive.

In my view, whenever a public figure has a “legitimate expectation” of being safe from the media, his or her right to private life prevails over the right to freedom of expression or the right to be informed.

It will never be easy to define in concrete terms the situations that correspond to this “legitimate expectation” and a case-by-case approach is therefore justified.

This casuistic approach may also give rise to differences of opinion.

The majority attach importance, for example, to the fact that the photos at the Monte Carlo Beach Club had been taken secretly.

I do not dispute the need to take account of the fact that the photos were taken from a distance, particularly if the person was somewhere they could legitimately believe did not expose them to public view.

However, the Beach Club swimming pool was an open place frequented by the general public and, moreover, visible from the neighbouring buildings.

Is it possible in such a place to entertain a reasonable expectation of not being exposed to public view or to the media?

I do not think so.

I believe that this same criterion is valid for photos showing the applicant in other situations in her daily life in which she cannot expect her private life to be protected.

I have in mind the photos of her doing her shopping.

However, other photos – for example those of the applicant on horseback or playing tennis – were taken in places and circumstances that would call for the opposite approach.

It is thus in the knowledge of the limits to the exercise (I refer in this connection to Judge Zupančič's opinion) that I have found a violation of Article 8 of the Convention.

CONCURRING OPINION OF JUDGE ZUPANČIČ

I adhere to the hesitations raised by my colleague, Judge Cabral Barreto. And while I find the distinctions between the different levels of permitted exposure, as defined by the German legal system, too *Begriffsjurisprudenz*-like, I nevertheless believe that the balancing test between the public's right to know on the one hand and the affected person's right to privacy on the other hand must be adequately performed. He who willingly steps onto the public stage cannot claim to be a private person entitled to anonymity. Royalty, actors, academics, politicians, etc. perform whatever they perform publicly. They may not seek publicity, yet, by definition, their image is to some extent public property.

Here I intend to concentrate not so much on the public's right to know – this applies first and foremost to the issue of the freedom of the press and the constitutional doctrine concerning it – but rather on the simple fact that it is impossible to separate by an iron curtain private life from public performance. The absolute *incognito* existence is the privilege of Robinson; the rest of us all attract to a greater or smaller degree the interest of other people.

Privacy, on the other hand, is the right to be left alone. One has the right to be left alone precisely to the degree to which one's private life does not intersect with other people's private lives. In their own way, legal concepts such as libel, defamation, slander, etc. testify to this right and to the limits on other people's meddling with it. The German private-law doctrine of *Persönlichkeitsrecht* testifies to a broader concentric circle of protected privacy. Moreover, I believe that the courts have to some extent and under American influence made a fetish of the freedom of the press. The *Persönlichkeitsrecht* doctrine imparts a higher level of civilised interpersonal deportment.

It is time that the pendulum swung back to a different kind of balance between what is private and secluded and what is public and unshielded.

The question here is how to ascertain and assess this balance. I agree with the outcome of this case. However, I would suggest a different determinative test: the one we have used in *Halford v. the United Kingdom* (judgment of 25 June 1997, *Reports of Judgments and Decisions* 1997-III), which speaks of "reasonable expectation of privacy".

The context of criminal procedure and the use of evidence obtained in violation of the reasonable expectation of privacy in *Halford* do not prevent us from employing the same test in cases such as the one before us. The dilemma as to whether the applicant here was or was not a public figure ceases to exist; the proposed criterion of reasonable expectation of privacy permits a nuanced approach to every new case. Perhaps this is what Judge

Cabral Barreto has in mind when he refers to the emerging case-law concerning the balancing exercise between the public's right to know and the private person's right to shield him- or herself.

Of course, one must avoid a circular reasoning here. The "reasonableness" of the expectation of privacy could be reduced to the aforementioned balancing test. But reasonableness is also an allusion to informed common sense, which tells us that he who lives in a glass house may not have the right to throw stones.

Order of the
Inter-American Court of Human Rights
Case of Claude-Reyes *et al.* v. Chile
Judgment of September 19, 2006
(*Merits, Reparations and Costs*)

In the Case of Claude Reyes *et al.*,

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), composed of the following judges: *

Sergio García Ramírez, President
Alirio Abreu Burelli, Vice President
Antônio A. Cançado Trindade, Judge
Cecilia Medina Quiroga, Judge
Manuel E. Ventura Robles, Judge, and
Diego García-Sayán, Judge;

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and Articles 29, 31, 56 and 58 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), delivers this judgment.

I
INTRODUCTION OF THE CASE

1. On July 8, 2005, in accordance with the provisions of Articles 50 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") lodged before the Court an application against the State of Chile (hereinafter "the State" or "Chile"). This application originated from petition No. 12,108, received by the Secretariat of the Commission on December 17, 1998.

* Judge Oliver Jackman did not take part in the deliberation and signature of this judgment, because he advised that, due to circumstances beyond his control, he would be unable to participate in the seventy-second regular session of the Court.

2. The Commission submitted the application for the Court to declare that the State was responsible for the violation of the rights embodied in Articles 13 (Freedom of Thought and Expression) and 25 (Right to Judicial Protection) of the American Convention, in relation to the obligations established in Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) thereof, to the detriment of Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero.

3. The facts described by the Commission in the application supposedly occurred between May and August 1998 and refer to the State's alleged refusal to provide Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero with all the information they requested from the Foreign Investment Committee on the forestry company Trillium and the Río Condor Project, a deforestation project to be executed in Chile's Region XII that "c[ould] be prejudicial to the environment and to the sustainable development of Chile." The Commission stated that this refusal occurred without the State "providing any valid justification under Chilean law" and, supposedly, they "were not granted an effective judicial remedy to contest a violation of the right of access to information"; in addition, they "were not ensured the rights of access to information and to judicial protection, and there were no mechanisms guaranteeing the right of access to public information."

4. The Commission requested that, pursuant to Article 63(1) of the Convention, the Court order the State to adopt specific measures of reparation indicated in the application. Lastly, it requested the Court to order the State to pay the costs and expenses arising from processing the case in the domestic jurisdiction and before the body of the inter-American system.

II JURISDICTION

5. The Court is competent to hear this case, in the terms of Articles 62 and 63(1) of the Convention, because Chile has been a State Party to the American Convention since August 21, 1990, and accepted the compulsory jurisdiction of the Court on the same date.

III PROCEEDINGS BEFORE THE COMMISSION

6. On December 17, 1998, a group composed of the "*Clínica Jurídica de Interés Público*" of the Universidad Diego Portales; the Chilean organizations "FORJA," the "Terram Foundation" and "*Corporación la Morada*"; the *Instituto de Defensa Legal* of Peru; the "*Fundación Poder Ciudadano*" and the *Asociación para los Derechos Civiles* (Argentine organizations); and Baldo Prokurica Prokurica, Oswaldo Palma Flores, Guido Girardo Lavín and Leopoldo Sánchez Grunert, submitted a petition to the Commission.

7. On October 10, 2003, the Commission adopted Report No. 60/03 declaring the case admissible. On November 11, 2003, the Commission made itself available to the parties in order to reach a friendly settlement.

8. On March 7, 2005, pursuant to Article 50 of the Convention, the Commission adopted Report No. 31/05, in which it concluded that Chile had "violated the rights of Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero of access to

public information and to judicial protection established in Articles 13 and 25 of the American Convention, respectively, in relation to Articles 1(1) and 2 of the Convention, by denying them access to information held by the Chilean Foreign Investment Committee and by not granting them access to Chilean justice to contest this refusal." The Commission recommended to the State that it should "disclose the information requested by Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero"; "[g]rant adequate reparation to Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero for the violation of their rights, including providing them with the requested information"; and "[a]dapt its domestic laws to Article 13 of the American Convention regarding access to information and adopt the necessary measures to establish practices and mechanisms that guarantee effective access to public information and information of public interest to the people of Chile."

9. On April 8, 2005, the Commission forwarded this report to the State and granted it two months from the date of transmittal to provide information on the measures adopted to comply with the recommendations made therein.

10. On April 8, 2005, the Commission informed the petitioners that it had adopted the report under Article 50 of the Convention and granted them one month to advise it of their position as regards submitting the case to the Court.

11. On June 8, 2005, the State requested an extension to inform the Commission about compliance with the recommendations contained in Report No. 31/05. The Commission granted it an extension until June 23, 2005.

12. On June 15, 2005, the petitioners presented a communication to the Commission expressing their interest in the Commission submitting the case to the Court's consideration.

13. On June 30, 2005, the State sent a report to the Commission in response to the recommendations made in Report on Merits No. 31/05 (*supra* para. 8). Chile also forwarded a copy of the foreign investment contracts and assignment contracts relating to the "Río Condor" Project.

14. On July 1, 2005, "in the understanding that the State had not adopted its recommendations satisfactorily," the Commission decided to submit the case to the Court's consideration.

IV

PROCEEDINGS BEFORE THE COURT

15. On July 8, 2005, the Inter-American Commission submitted the application to the Court, attaching documentary evidence and offering testimonial and expert evidence. The Commission appointed Evelio Fernández Arévalo, Santiago A. Canton and Eduardo Bertoni as delegates and Ariel Dulitzky, Victor H. Madrigal-Borloz, Christina M. Cerna and Lisa Yagel as legal advisers (*infra* para. 22).

16. On August 4, 2005, after the President of the Court (hereinafter "the President") had made a preliminary review of the application, pursuant to the provisions of Article 35(1)(b) of the Rules of Procedure, the Secretariat of the Court (hereinafter "the Secretariat") notified it, together with the appendixes, to the State informing the latter of

the time limits for answering the application and appointing its representatives in the proceedings.

17. On August 4, 2005, the Secretariat, pursuant to the provisions of Article 35(1)(e) of the Rules of Procedure, notified the application and its appendixes to Juan Pablo Olmedo Bustos, representative of the alleged victims (hereinafter "the representative"), informing him of the time limit for presenting his brief with requests, arguments and evidence (hereinafter "requests and arguments brief").

18. On August 5, 2005, the State submitted a brief in which it requested the Court "to consider the information provided opportunely to the Inter-American Commission[, in communications of June 30, 2005 (*supra* para. 13) and July 8, 2005¹, when making the preliminary examination of the merits of the application for the effects of admissibility."

19. On August 23, 2005, the State appointed Amira Esquivel Utreras as Agent and Miguel Ángel González Morales as Deputy Agent.

20. On September 28, 2005, the representative forwarded his requests and arguments brief accompanied by documentary evidence, and offered expert evidence. On October 3, 2005, he presented the appendixes to this brief.

21. On December 2, 2005, the State submitted the brief answering the application and with observations on the requests and arguments brief, together with documentary evidence, and offered testimonial and expert evidence. On December 23, 2005, it presented the appendixes to this brief.

22. On January 17, 2006, the Commission submitted a communication accrediting Lilly Ching as legal adviser in this case, in substitution of Lisa Yagel (*supra* para. 15).

23. On February 7, 2006, the Court issued an order in which it called upon Sebastián Cox Urrejola and Arturo Longton, proposed as witnesses by the Commission, and Andrés Emilio Culagovski Rubio and Liliana Guiditta Macchiavelo Martini, proposed by the State, to provide their testimony by means of statements made before notary public (affidavits). It also called upon Claudio Francisco Castillo Castillo, proposed as an expert witness by the State, and Tomás Vial del Solar, Miguel Ángel Fernández and Davor Harasic Yaksic, proposed as expert witnesses by the representative, to provide their expert opinions by way of statements made before notary public (affidavits). In the same order, the Court convened the parties to a public hearing to be held in Buenos Aires, Argentina, on April 3, 2006, in the courtroom of the Supreme Court, to hear their final oral arguments on merits and possible reparations and costs, as well as the testimonial statements of Marcel Claude Reyes, proposed by the Commission, and Eduardo Jorge Moyano Berrios, proposed by the State, as well as the expert opinions of Ernesto Villanueva, proposed by the Commission, Roberto Mayorga Lorca, proposed by the alleged victims' representative, and Carlos Carmona Santander, proposed by the State. In this order, the Court also informed the parties that they had until May 18, 2006, to submit their final written arguments on merits and possible reparations and costs. The Court also admitted the

¹ On July 8, 2005, Chile, through its Embassy in Costa Rica, presented to the Secretariat of the Court copy of a communication dated July 8, 2005, from the State to the Inter-American Commission in which, *inter alia*, it "reiterate[d] its willingness to comply with the recommendations contained in Report No. 31/05 of March 7, 2005, [...] and to adopt the necessary measures to this end, coordinating the actions of the respective bodies of the State Administration."

offer of evidence made by the representative in his requests and arguments brief and called upon him to present this evidence directly to the Court.

24. On February 17, 2006, the alleged victims' representative and the State requested an extension to present the testimonies and expert evidence provided by statements before notary public, in response to the request made in the Court's order of February 7, 2006. The President of the Court granted the representative, the State and the Commission the requested extension until March 10, 2006.

25. On February 17, 2006, the *Asociación por los Derechos Civiles* (ADC) submitted a brief in which, "in its capacity as one of the original petitioners before the Commission," it requested authorization to intervene in the public hearing on April 3, 2006. On the instructions of the President, the Secretariat admitted the brief submitted by ADC as an *amicus curiae*. Regarding the request to take part in the public hearing, it did not allow the Association to participate directly, informing it that only those persons accredited by the parties to the case could present their arguments.

26. On March 10, 2006, the Inter-American Commission forwarded the written statements of the witnesses, Luis Sebastián Cox Urrejola and Arturo Longton Guerrero. The same day, Chile forwarded the written statements of the witnesses, Andrés Emilio Culagovski Rubio and Liliana Guiditta Macchiavello Martini, and the expert witness, Claudio Francisco Castillo Castillo (*supra* paras. 23 and 24).

27. On March 13, 2006, the alleged victims' representative forwarded the written statements of the expert witnesses, Tomás Vial Solar, Miguel Ángel Fernández González and Davor Harasic Yaksic (*supra* paras. 23 and 24). The representative also forwarded four documents "issued after the requests brief had been presented," "[p]ursuant to Article 44(3) of the Rules of Procedure" of the Court. In addition, in relation to the evidence admitted by the Court in its order of February 7, 2006 (*supra* para. 23), the representative sent a report issued on February 15, 2006, by the Chairman of the Presidential Advisory Committee for the Protection of Human Rights, together with a communication from the Executive Director of the Open Society Justice Initiative dated February 20, 2006, enclosing a report entitled: "Transparency and Silence. A Survey of Access to Information Laws and Practices in Fourteen Countries." Lastly, the representative forwarded two *amici curiae* briefs submitted by the Center for Legal and Social Studies (CELS) and Damián M. Loreti and Analía Eliades (professors, the UNESCO Freedom of Expression Chair of the School of Journalism, Universidad Nacional de La Plata), and by Gastón Gómez Bernalles (professor of the Law School of the Universidad Diego Portales). The representative's brief and appendixes were first received by e-mail on March 10, 2006.

28. On March 27, 2006, the Commission submitted a brief in which it stated that "it had no comments to make" on the evidence presented by the alleged victims' representative (*supra* para. 27), and that "it had no comments on the sworn statements submitted to the Court" by the State and the representative (*supra* paras. 26 and 27).

29. On March 28, 2006, Chile remitted its comments on the written testimonies and expert opinions submitted by the Commission and the alleged victims' representative (*supra* paras. 26 and 27), and also on the evidence forwarded by the representative (*supra* para. 27).

30. On March 28, 2006, the Open Society Justice Initiative, ARTICLE 19, the *Instituto Prensa y Sociedad*, Access Info Europe and *Libertad de Información México* presented an *amici curiae* brief.

31. On March 31, 2006, the Impact Litigation Project of the American University Washington College of Law forwarded an *amicus curiae* brief.

32. On April 3, 2006, a public hearing was held on merits, and possible reparations and costs. There appeared before the Court: (a) for the Inter-American Commission: Evelio Fernández and Santiago A. Canton, delegates; Víctor H. Madrigal Borloz, Lilly Ching, Juan Pablo Albán, Carlos Zelada and Ignacio Álvarez, legal advisers; (b) for the alleged victims: Juan Pablo Olmedo, representative, and Ciro Colombana López, adviser; and (c) for the State of Chile: Amira Esquivel Utreras, Agent; Patricio Aguirre Vacchieri and Virginia Barahona Lara. Also, the witnesses and expert witnesses proposed by the parties (*supra* para. 23 and *infra* para. 49). In addition, the Court heard the final arguments of the Commission, the representative, and the State. At the end of the public hearing, the representative submitted a copy of the book entitled "*Derechos fundamentales y recursos de protección*" by Gastón Gómez Bernales (*infra* para. 40).

33. On May 18, 2006, the Commission presented its final written arguments on merits reparations, and costs. On May 23, 2006, the Commission presented an appendix to these final arguments.

34. On May 18, 2006, the alleged victims' representative forwarded his final written arguments; the appendixes were sent the following day. The representative presented "a summary of the results of the access to information survey conducted [by the Open Society Justice Initiative] in 14 countries, including Chile, in 2004," in relation to the evidence admitted by the Court in its order of February 7, 2006 (*supra* para. 23).

35. On May 19, 2006, the State presented its final written arguments.

36. On May 23, 2006, the Executive Director of the Open Society Justice Initiative submitted the same document that the alleged victims' representative had forwarded on May 18, 2006 (*supra* para. 34).

37. On May 24, 2006, the representative forwarded the Spanish version of the report of the Open Society Justice Initiative, the English version of which had been submitted on March 13, 2006 (*supra* para. 27).

38. On June 5, 2006, the Center for Justice and International Law (CEJIL) presented an *amicus curiae* brief.

39. On July 5, 2006, on the instructions of the President, the Secretariat requested the Inter-American Commission and the representative to present certain documentation as helpful evidence by July 14, 2006, at the latest.

40. On June 7, 2006, in response to the Secretariat's request, the representative forwarded two copies of the book entitled "*Derechos fundamentales y recursos de protección*," which he had submitted at the end of the public hearing (*supra* para. 32); these copies were forwarded to the other parties.

41. On July 11, 2006, the Commission remitted the evidence requested in the note of July 5, 2006 (*supra* para. 39).

42. On July 14, 2006, the State submitted a communication with "comments and observations" on the *amicus curiae* brief presented by CEJIL on June 5, 2006 (*supra* para. 38).

43. On July 18, 2006, the alleged victims' representative responded to the request for helpful evidence in the Secretariat's note of July 5, 2006 (*supra* para. 39).

44. On July 25, 2006, the Secretariat informed the parties that, on the instructions of the President, they were granted seven days to forward any observations they deemed pertinent on the helpful evidence presented on July 11 and 18, 2006 (*supra* paras. 41 and 43).

45. On July 28, 2006, Chile presented its observations on the helpful evidence submitted by the Inter-American Commission and the alleged victims' representative in briefs of July 11 and 18, 2006, respectively (*supra* paras. 39, 41, 43 and 44).

46. On July 31, 2006, the Commission submitted a brief indicating that "it had no observations to make" on the helpful evidence presented by the alleged victims' representative (*supra* para. 43).

47. On August 7, 2006, the alleged victims' representative forwarded the electronic version of the "[nineteenth] report of the Presidential Advisory Committee for the Protection of Human Rights, corresponding to the second quarter of 2006" and requested "its incorporation as part of the evidence provided in the instant case."

V EVIDENCE

A) DOCUMENTARY EVIDENCE

48. The documentary evidence submitted by the parties included the written testimonial statements and expert opinions requested by Court in its order of February 7, 2006 (*supra* para. 23). These statements and opinions are summarized below:

TESTIMONIES

a) Proposed by the Inter-American Commission on Human Rights

1. Luis Sebastián Cox Urrejola, alleged victim

He is a lawyer and representative of the non-governmental organization "*FORJA*", whose purpose is to improve the capacity of individuals and groups to exercise their rights.

In May 1998, "together with Marcel Claude and Arturo Longton, he submitted the application for information to the Foreign Investment Committee" (hereinafter "FIC" or "the Committee") requesting information on Forestal Trillium Ltda. and the Río Cóndor Project, in order, as members of civil society, to contribute to and ensure enhanced community involvement and information "so as to ensure the maximum social responsibility of private companies in the context of the major public investments promoted and authorized by the State and its institutional framework." "Owing to the refusal of the Committee and its authorities," they filed several judicial recourses.

The Committee's failure to respond to the said application or to provide an official refusal resulted in a harm to "public interest and to the interests of the community" he has been defending, as well as the State entity's non-compliance with its obligations and related national and international norms and recommendations. This non-compliance "concern[ed] the suitability of the investor, the execution of the authorized investment, and compliance with Decree Law No. 600."

2. Arturo Longton Guerrero, alleged victim

He has been a Member of Congress of the Republic of Chile for more than 16 years, and "during this time [has] been involved in various initiatives designed to safeguard fundamental human rights." "In 1997 [(sic)], as a concerned citizen, as well as in exercise of [his] functions as a Deputy of the Republic of Chile, and worried about the possible indiscriminate felling of indigenous forests in the extreme south of Chile by a foreign company[, ...] together with [...] Marcel Claude [Reyes, he] met with the Director of Foreign Investment in Chile to obtain information regarding the veracity of the affirmations of [the] company that was cutting down indigenous forests, requesting diverse elements of information about the foreign investor concerned [...] and[,] in particular, about the background data that demonstrated his suitability and soundness." "This refusal of public information signified a violation of [his] human rights; it also affected and impaired [his] authority as a Deputy of the Republic and hindered [his] oversight responsibilities."

He referred to several cases that, in his opinion, involved refusal to disclose public information and in which he has intervened directly, and stated that such cases "are repeated constantly throughout [Chile's] Ministries and Public Administration."

b) Proposed by the State

3. Andrés Emilio Culagovski Rubio, lawyer and Oversight Officer (Fiscal) of the Foreign Investment Committee

The Foreign Investment Committee "is a functionally-decentralized, public-law juridical person, with its own assets, domiciled in Santiago, linked to the President of the Republic through the Ministry of Economy, Development and Reconstruction." "Under Decree Law [No. 600], it is the only agency authorized, in representation of Chile, to accept the entry of foreign capital and to establish the terms and conditions of the respective contracts." The other functions of FIC include the following: to receive, examine and take a decision

on foreign investment applications; to administer the respective foreign investment contracts; to prepare studies and background material on interpretation; to keep a statistical record of foreign investment in the country under Legislative Decree No. 600; to take part in international negotiations on foreign investment; to participate in activities to promote Chile as a country for foreign investment; to centralize information and data concerning the control that public bodies should exercise on the commitments made by foreign investors or the companies in which they invest, and to denounce before the competent public entities and authorities any offense or infraction that comes to its attention; to take and expedite the necessary measures before the public agencies that must provide information or give their authorization prior to the approval of the different applications on which FIC must decide; to investigate in Chile or abroad the suitability and soundness of the applicants or interested parties; as well as any other function entrusted to it by the laws in force or the competent authorities.

He referred to the structure of FIC and indicated that the Committee had an Executive Vice Presidency to carry out its functions and obligations.

He mentioned the type of authorization that FIC can grant a foreign investment application and the background material it must have in order to grant it.

In the case of the foreign investment project represented by Forestal Trillium Ltda., the FIC Executive Vice Presidency merely received, studied and decided on the foreign investment application, verifying that it complied with the legal requirements. When the FIC Executive Vice Presidency had taken a decision on the application it was presented to the Foreign Investment Committee for approval.

The witness had no information on the Forestal Trillium Ltda. project, since he was not supposed "to monitor or intervene in the implementation stages of economic projects whose capital flows had been authorized."

4. Liliana Guiditta Macchiavello Martini, lawyer of the Foreign Investment Committee

She has been one of the Foreign Investment Committee's lawyers since 1997 and has exercised diverse functions within its oversight unit (*fiscalía*).

She referred to the way in which FIC is structured. She indicated that the functions of the Executive Vice Presidency, defined in Articles 15 and 15 bis of Legislative Decree No. 600, "demonstrate that the role of [this Committee and its] Vice Presidency is merely to authorize the flow of foreign capital into Chile under any of the investment models described in Article 2 of this decree."

"The limited role of FIC in authorizing the entry of foreign capital into Chile is not altered by the obligation that Article 15(e) of this Decree imposes on the Vice Presidency [of this Committee ...], that it should interact with the public bodies that must give their authorization before FIC approves the foreign investment application." This obligation only refers to cases in which the respective sectoral laws require a public entity's authorization of investments in some specific industrial and commercial sectors. Health, environmental and other permits must be requested from the competent authorities complying with the respective requirements.

The role of FIC to investigate the suitability and soundness of applicants involves requiring foreign investors to provide all public or private background material in Chile or abroad that proves they have access to the capital they wish to import into the country. "Regarding the foreign investors involved in the Trillium Project, they were requested to provide all the background information required from juridical persons [...] Based on the background material provided [...], the Foreign Investment Committee considered they complied with the [required] conditions of soundness and suitability"

At the time the petitioners in this case requested information from FIC, its Vice Presidency "considered that all information regarding third parties was of a confidential nature, if its disclosure could constitute a violation of the privacy of the owners of the information, irresponsibly endangering the results of the investors' activities in [Chile]." The witness alluded to some of the information considered of a confidential nature, such as commercial information, copyrights and trademarks, use of technology and, in general, the specific characteristics of the investment projects that investors wished to develop with the capital they were requesting the authorization of FIC to transfer to Chile. When submitting investment applications, investors were not obliged to present "totally defined or structured" projects; consequently, the FIC Vice Presidency and FIC had to manage the information provided by investors with extreme prudence, to provide them with an adequate assurance that the details of their commercial activities would not be divulged. Administrative Decision *Exenta* [Note: exempt from the control of the Comptroller General's Office] No. 113 of 2002 contains the abovementioned criteria and establishes the records, documents and background data of the FIC Vice Presidency that should be considered secret or confidential. The 2005 Chilean Constitution imposes the obligation to review all existing information policies to ensure they are in keeping with Article 8 of the Constitution. To this end, in official communication No. 072 of 2006, the Ministry-General Secretariat of the Presidency provided the public services with guidelines on transparency and disclosure of the Administration's acts.

Regarding the attitude of FIC to the Terram Foundation's request: during the meeting held between the petitioners and the FIC Executive Vice President, the latter "provided them with the information they requested on the project, in keeping with the criteria on disclosure and confidentiality in force at the time. The same day, the information was complemented by a fax addressed to Marcel Claude Reyes. Disregarding the information provided by the FIC Vice Presidency, the Terram Foundation repeated its request on two occasions (June 3 and July 2, 1998) and, subsequently, initiated a series of complaints and claims before the courts of justice and the media, a situation that gave rise to the corresponding clarifications by the FIC Vice Presidency. The information provided by the FIC Vice Presidency to the Terram Foundation was "the information that FIC possessed"; namely, information on "the foreign investment contracts signed under Legislative Decree No. 600, the identity of the investors, the authorized amount of the investment, the capital inflow schedule, [...] and the] capital that had effectively been imported."

The FIC Vice Presidency's "communications policy" has always been applied in the same way to all those requesting any information or background material "that it might have." The witness considered that the same procedure was followed in this case as in any other request for this type of information.

EXPERT OPINIONS

a) Proposed by the alleged victims' representative

1. Tomás Vial Solar, lawyer

He was legal adviser to the Ministry-General Secretariat of the Presidency from 2002 to 2004.

According to the reports of the respective Senate and Chamber committees, the reform of Article 8 of the Constitution "was understood [...] merely as elevating to constitutional rank the contents of Articles 13 and 15 of the 1999 Constitutional Organic Law on General Principles of [State] Administration." During the Parliamentary discussion, "there was never any mention of the existence of a right of access to information for the population"; "nor was there any record of their having discussed the effects of the reform on the different body of the State and on the legislation in force"; nor "was the need to modify the legislation in force or to make an effort to provide increased access to information mentioned."

The new Article 8 of the Constitution introduced a constitutional principle of disclosure that applies to all State entities; consequently, its scope is greater than the General Principles Law which refers only to the State Administration.

The constitutional provision indicates that acts, together with the decisions and procedures on which they are based, shall be public. The words "acts" and "procedures" should be understood in the broadest sense. Regarding the grounds for acts and decisions, all documents relating to any specific act of the State are public.

The constitutional provision establishes that restrictions of access to information shall be imposed only by a law adopted by a special quorum (the absolute majority of the elected senators and deputies). The new grounds established in Article 8 of the Constitution stipulate that secrecy or confidentiality can only be established when disclosure would affect due compliance with the functions of State entities, individual rights, national security and public interest. This provision also reduced the reasons for which information may be declared secret or confidential.

"The adoption of the constitutional reform [...] rendered unconstitutional both the provisions of Article 13 of the General Principles Law, which allowed this confidentiality to be established using rules of a regulatory nature, and also the Secrecy and Confidentiality Regulations and all corresponding decisions." The constitutional provision is more restrictive regarding the grounds for refusing information than the legal provision (Article 13 of the General Principles Law), because it establishes "that, in order to refuse information, an individual's rights must be affected." Nevertheless, it is less demanding, since the legal provision established that disclosure should affect the rights of the third party "noticeably," while the constitutional reform does not mention this specifically. The legal provisions to establish the secrecy or confidentiality of some issues, which were enacted prior to the constitutional reform, retain their validity, to the "extent that they do not substantially conflict with the Constitution."

He indicated that although the constitutional reform represented progress from the section of view of ensuring access to information, it did not include a positive obligation by the State and, thus, did not constitute a right. Since access to information is not a constitutional right, a conflict arises when it is weighed with other rights that have a constitutional rank and that would have priority. Also, since it is not a constitutional right, the State does not have the constitutional obligation "to promote it or to create the conditions for its due protection."

Regarding the Administration's mechanisms for protecting access to information, he referred to the provisions on access to information that relate to the Administration, particularly Articles 13 and 14 of the Constitutional Organic Law on General Principles of [State] Administration. This law establishes that administrative acts, the documents that complement them or directly support them, and company reports or background material are public.

In relation to the grounds for refusing information, paragraph 11 of Article 13 of the General Principles Law establishes five reasons. It should be understood that the first was derogated by the constitutional reform, because it established that confidentiality or secrecy could be established by legal or regulatory provisions; the second is that the disclosure would impede or prevent due compliance with the functions of the entity from which information is requested; the third is the opposition of third parties; the fourth is that the rights or interests of third parties are substantially affected, and the fifth is that disclosure would affect national security or interests. The scope of the second reason could lead to an "arbitrary interpretation" by the authorities.

With regard to recourses when access to information is refused, the applicant may file administrative remedies and also a recourse to justice called "*amparo* [protection] of information" included in Article 14 of the General Principles Law. Regarding administrative remedies, the law "does not include a specific recourse"; the applicant must therefore use general remedies such as an appeal for reconsideration of judgment and an appeal to a higher instance. "The effectiveness of these remedies is limited in cases of requests for information."

2. Miguel Ángel Fernández González, lawyer

The evolution of legislation on the protection of the right of access to information includes the proposals made by the National Public Ethics Commission, which were implemented by: promulgation of Act No. 19,653; incorporation of the principle of disclosure of the acts of the body of State Administration; inclusion of a special judicial proceeding if the entity from which information is requested does not provide access to this information; publication of Act No. 19,880 on administrative procedures, and constitutional recognition of the principle of disclosure in Article 8 of the Constitution.

Regarding the current legislation on access to public information, he indicated the importance of the fact that the principle of disclosure had been elevated to constitutional rank, also establishing a legal reservation regarding the grounds on which secrecy or confidentiality may be declared. He indicated the problems faced by the right of access to public information, owing to the existence of grounds for confidentiality with such a wide and vague content such as national interest and national security.

3. Davor Harasic Yaksic, lawyer, President of the Chilean Chapter of Transparency International, and Adviser to the State's Defense Council from 1972 to 1996

He referred to the content of Chilean laws on access to State-held information. Act No. 19,653 of 1999 on Administrative Probity of the Body of the Administration, and the 2003 Administrative Procedure Act established the principles of transparency and disclosure as central elements of the proper exercise of public service. The 2005 constitutional reform elevated the principles of transparency and disclosure to constitutional rank and extended them to all the body of the State.

He mentioned what he considered are the obstacles and restrictions to access to public information in Chile. The law that formally incorporated the principle of disclosure into the Chilean legal system (the Administrative Probity Act) allowed the right of access to information to be restricted by providing that the grounds for refusing access could be established by legal or regulatory provisions. From 2001 to 2005, administrative practices were implemented that favored the confidentiality and secrecy of administrative acts, documents and background material. These practices were based on the Secrecy or Confidentiality Regulations created by Supreme Decree No. 26 of the Ministry-General Secretariat of the Presidency. The Regulations transcended the framework of normative jurisdiction, increased the grounds for refusing information, and gave rise to the announcement of some one hundred decisions by body of the Administration that transformed secrecy and confidentiality into "the general rule, impairing the principles of transparency and disclosure." Another obstacle was the limited and insufficient judicial protection arising from the special *amparo* (protection) remedy established in the Administrative Probity Act which, far from strengthening the principle of disclosure and access to information, has resulted in departmental heads choosing to "wait for a judicial decision," which also provides little protection to applicants.

b) Proposed by the State

4. Claudio Francisco Castillo Castillo, lawyer

He referred to the nature and functions of the Foreign Investment Committee under the provisions of Legislative Decree No. 600. He underscored the work of promoting investments carried out by the FIC Vice Presidency from 1994 to 2000.

Regarding the processing of foreign investment applications, investors who "wish to make investments in Chile [...] must complete a Foreign Investment Application on a printed form prepared by the FIC Vice Presidency." On the form, the investor must provide, *inter alia*, information on "[n]ame or company name; principal associates or shareholders; nationality; financial information; line of business; brief description of the project to be [executed] in Chile; amount of the proposed investment to execute the project; background information on the Chilean company that will receive the investment; [and whether the investors] have decided to take advantage of the invariable tax regime."

This investment application must be presented to the FIC Vice Presidency accompanied by the investor's legal registration data. The FIC Vice Presidency must assess the formal aspects and, lastly, applications involving less than US\$5 million must be authorized by the Executive Vice President following the agreement of the President of the Foreign Investment Committee; applications involving more than US\$5 million must be authorized by the members of the Committee. The authorization granted to the investors to make their capital contributions is "without detriment to the authorizations that must be obtained from the local authorities, according to the type of project planned."

With regard to the level of confidentiality of the actions, documents and operations related to foreign investment projects in Chile, all the data held by the FIC Vice Presidency in relation to each project is provided by the investors. During the 1990s, a distinction was made between the levels of confidentiality of the information presented by the investors. Some information was not of a public nature because it referred "to a specific business undertaking owned by the foreign investors." Regarding the latter, the FIC Vice Presidency "was very careful not to provide this information to third parties." "The significant expansion of many of the country's productive sectors would not have

been possible if FIC had not been prudent about how it managed the technical, financial and economic information relating to foreign investment projects."

B) TESTIMONIAL AND EXPERT EVIDENCE

49. On April 3, 2006, the Court received the statements of the witnesses proposed by the Inter-American Commission on Human Rights and by the State, and of the expert witnesses proposed by the Commission, by the alleged victims' representative, and by the State during a public hearing (*supra* para. 32). The Court summarizes the principal parts of these testimonies and expert opinions below.

TESTIMONIES

a) Proposed by the Inter-American Commission

1. Marcel Claude Reyes, alleged victim

He is an economist, and was a founder of the Terram Foundation as well as its Executive Director from 1997 to 2003. The basic aims of this organization were "to participate actively in public debates and in the production of sound, scientific information to support the social and civic efforts of the people of Chile in favor of sustainable development." In 1983, he was an official of the Central Bank and was appointed as an adviser to the Foreign Investment Committee and to the Environmental Accounts Unit.

Regarding his request for information from the Foreign Investment Committee in relation to the Río Cóndor project and the Trillium company, his intention had been to "play an active part [...] in the debate and discussion on the Río Cóndor project [...] from an economic perspective, in order to make a technical, financial and social evaluation of the project, and [to assess] the potential [...] development of the region [and] of the country [as a result] of the project." The project had a "significant environmental impact" and gave rise to public debate.

Playing an active part, "required a series of elements of information [from the Foreign Investment Committee], because the information held by the public entities involved in environmental matters and by the public itself was insufficient." A formal written request was made, asking, among other matters, for information on the suitability of the investor, his international experience and his compliance with the environmental, legal and fiscal laws and regulations. "As a result of [this] request, [they] received a note from the Executive Vice President of the Committee at that time [...], who invited [Arturo Longton and himself] to a meeting," during which he handed them "a sheet with the name of the investor, the name of his company [and] the amount of capital that he had asked to import into the country." Following the meeting, he received "a fax on the afternoon of that same day [...] stating that [...] the information on associated capital amounts had been omitted; however, this was not included in the fax." He stated that he had obtained partial information and had not receive either an oral or written response concerning the missing information, or the reasons why he had not been given or would not be given this information, even after insisting on two further occasions. Subsequently, after a "reasonable time" had elapsed and without knowing why the information had been refused, they resorted to the courts of law, filing a remedy of protection, which was rejected "because it was not pertinent"; an appeal for

reconsideration of the judgment concerning the remedy for protection, which was rejected, and a complaint before the Supreme Court, which was also rejected.

"The forestry project [in question] was never executed, because, after about five years of negotiation, public debate and public obstruction [...], it was not implemented owing to financial problems."

He referred to information they requested from the National Forestry Commission in 2000 concerning an investigation carried out by that agency. The information was not provided and they resorted to the courts; on this occasion they won the action for access to information.

Based on his experience in relation to environmental issues, he considers that "it is extremely difficult to have access to information" and, consequently, asks that "this information [which he was refused] should be made public [...]" and that the State of Chile should end the practice of secrecy, which prevents its citizens from exercising their rights and is an obstacle to freedom of expression."

b) Proposed by the State

2. Eduardo Moyano Berríos, Executive Vice President of the Foreign Investment Committee from 1994 to 2000

With regard to the management of foreign investment projects, "each project has a file, containing all the information provided [by the investor] to FIC." "The complete information file" is not sent to the Ministers, but rather "a report on this information [and] any documents considered to be of major importance." He is "certain there is [a file] on the Trillium project," and also that "the Ministers duly approved the project in 1991, if my memory does not fail me." "There was a public debate on the project" during the time he was Executive Vice President of FIC.

The Terram Foundation's request for information on the Trillium project in May 1998 resulted in a meeting on May 19, 1998, during which "a significant part of the information it held [was handed over], additional information was sent to the Terram Foundation by fax the same day." The information provided concerned "when the project had been approved, the names of the companies involved, the investment flows to date, the type of project, its location, etc."

Regarding the information that gave rise to the dispute, as Vice President he did not provide the information requested in section 3 of the request for information, because "the Foreign Investment Committee [...] did not disclose the company's financial data, since providing this information would be contrary to public interest," which was "the country's development." "It was not reasonable that foreign companies applying to the Foreign Investment Committee should have to disclose their financial information in this way, information that could be very important to them in relation to their competitors; hence, this could have been an obstacle to the foreign investment process." He did not provide the information requested in section 6, because the background information that the Committee could request from other institutions "did not exist," and the Committee did not have policing functions; and he did not provide the information requested in section 7, because "the Foreign Investment Committee had neither the responsibility nor the capacity to evaluate each project on its merits; it had a staff of just over 20 persons. Furthermore, this was not necessary, since the role of the Foreign Investment Committee

is to authorize the entry of capital and the corresponding terms and conditions, and the country had an institutional framework for each sector." Trillium was not consulted prior to the refusal of this information; rather the refusal was based on "a policy" and the practice of the Foreign Investment Committee and its Executive Vice Presidency.

Regarding the mechanism for responding to requests for information received by the Committee, the practice was to answer the request in writing. In this case, the request "was answered by a meeting and a fax." Subsequently, "there were letters [...] that were answered orally"; in other words, "there was personal contact" and, hence, it was not considered "necessary to formalize this exchange." He stated that "written questions should be answered in writing and, if this was not always done, [he was] guilty of an administrative error."

EXPERT OPINIONS

a) Proposed by the Commission

1. Ernesto Villanueva, lawyer

"Article 13 of the Convention has been interpreted systematically as a source of one aspect of the right of access to public information." "On the one hand, human development [...] is engendering increased demand [as regards] the spirit of the norm [and,] on the other hand[...] the right of access to public information implies that [society] is the owner of the right [...] and that [...] the State authorities are depositaries of information that does not belong to them."

An appropriate law on access to public information should include an extensive number of entities that are obliged to provide information, and applicants for information should not have to justify their request, since it refers to public information and, thus, to a fundamental human right. Another important factor is that, when classifying information as confidential, limited use should be made of the exceptions. It must be demonstrated that there is probable and possible harm that would affect the general interest and the exception invoked; consequently, it would be necessary to explain the reasons why this information has not been provided. In addition, it must be shown that this harm would be greater than the public's right to know the information for "reasons of public interest." Only in this way, could a distinction be made between confidentiality based on political criteria, and confidentiality because matters of public interest that should be retained as an exception to access to information could be jeopardized. The law should provide for institutions to ensure compliance.

The more advanced countries have introduced legal measures such as the obligation to keep a complete record of all activities; they also give the regulatory agency powers to investigate and crosscheck, allowing it to verify whether the information truly does not exist or whether this is merely a mechanism for refusing to provide it to the applicant.

In this specific case, the Foreign Investment Committee did not conform to international standards. The modifications that Chile has made to its laws do not meet these standards, because, owing to legal vacuums, the State is able to cite a series of discretionary factors by interpreting the exceptions in order not to provide the requested information.

The problem of discretionality has gradually been reduced by legal mechanisms. In the different legislatures, it is becoming more frequent to observe the State's extensive capacity to invoke a series of factors when faced by gaps in the law. In some countries, measures have been implemented that emphasize this possibility of discretionality. Exceptions to the disclosure of public information should be minimal, established by law and regulated insofar as possible, to avoid information of public interest being incorporated into some of these exceptions. "The crucial section is to ensure that the laws on access to public information produce concrete results with reports and information that allow society to exercise an oversight function, [...] to combat corruption, [...] to satisfy personal interests, [...] to exercise rights and [...] to comply with obligations."

b) Proposed by the alleged victims' representative

2. Roberto Mayorga Lorca, lawyer, and FIC Oversight Officer (*fiscal*) and Vice President from 1990 to 1994

According to Article 15 of Decree Law No. 600 (Investment Act), the mandate and the obligations of the Foreign Investment Committee are to study and to provide information on investment applications, which means investigating in Chile and abroad the suitability and soundness of those who present applications. Also, FIC must "report any offense or infraction it learns about to the competent public authorities and entities." According to Decree law No. 600, the Committee is obliged not only to examine the transfer of capitals but also the suitability of the investor, based on the information assembled when the request is presented and on its own criteria. Even though it does not have an "external investigation network," FIC had a permanent connection with the international police, which verified whether the investment applicants had a criminal record.

Once the application had been submitted, all the documentation collected by the Committee formed part of a file examined by the legal department, which prepared a report on whether the investment was admissible. If the report was positive, a decision was taken on whether the project should be approved or rejected at a meeting between the Foreign Investment Committee, the Ministers, the Oversight Officer and the Vice President.

c) Proposed by the State

3. Carlos Carmona Santander, lawyer

In 2005, the Constitution of the Republic was reformed and "for the first time, provisions applicable to all State entities were introduced into [the Chilean] system, establishing the obligation to provide [the petitioner] with the requested information." Until then, the right of access to information was regulated by law; however, with the reform, it became regulated directly by the Constitution, as a principle applicable to all State entities. This provision is established in the first title of the Constitution, which provides the basis for interpreting all the other titles that regulate the different powers and rights of the individual.

This constitutional regulation establishes that it is possible to refuse a request for information based on secrecy or confidentiality, which may be established for a series of reasons, including the following: when disclosure would affect due compliance with the functions of the [State] entities; when disclosure would affect individual rights; and when

disclosure would affect national security or national interest. There is a radical change in this regard, because the reasons are set out in the Constitution itself and are regulated by a law enacted by special quorum (the majority of elected deputies and senators).

He referred to the legal recourses available to protect the right of access to public information. Currently, there are specific legal recourses in relation to access to administrative information, which do not extinguish and which allow the Administration's classification of information to be discussed to determine whether it conforms to the legal reasons for refusing to provide information. He also referred to the disciplinary sanctions contained in the 1999 Probity Act, applicable to officials who refuse to provide requested information without a specific reason.

Regarding the protection of the right of access to information, the citizenry has the following guarantees: the right to request access to information without cost, except for the respective photocopy; the right to contest refusal by regular administrative remedies; and the legislative requirement of a special quorum in Congress to establish restrictions to the right.

C) ASSESSMENT OF THE EVIDENCE

Assessment of the documentary evidence

50. In this case as in others,² the Court accepts the probative value of the documents presented by the parties at the proper procedural opportunity or as helpful evidence, which were not contested or opposed, and whose authenticity was not questioned. Also, in accordance with Article 44(3) of the Rules of Procedure, the Court accepts the documents forwarded by the alleged victims' representative on March 13, 2006 (*supra* para. 27), subsequent to the submission of the requests and arguments brief, as well as the Spanish version of one of these documents, presented on May 24, 2006 (*supra* para. 37), taking into account the State's observations (*supra* para. 29) and assessing them together with the body of evidence.

51. Regarding the written statements made by the witnesses, Luis Sebastián Cox Urrejola, Arturo Longton Guerrero, Andrés Emilio Culagovski Rubio and Liliana Guiditta Macchiavello Martini, and also by the expert witnesses, Claudio Francisco Castillo Castillo, Tomás Vial Solar, Miguel Ángel Fernández González and Davor Harasic Yaksic (*supra* paras. 26 and 27), the Court considers them pertinent, to the extent that they are in keeping with the purpose defined in the Court's order requesting them (*supra* para. 23), taking into account the State's observations (*supra* para. 29). On other occasions, the Court has admitted sworn statements that were not made before notary public, when this does not affect legal certainty or the procedural equality of the parties.³

² Cf. *Case of Ximenes Lopes*. Judgment of July 4, 2006. Series C No. 149, para. 48; *Case of the Ituango Massacres*. Judgment of July 1, 2006. Series C No. 148, para. 112; and *Case of Baldeón García*. Judgment of April 6, 2006. Series C No. 147, para. 65.

³ Cf. *Case of Ximenes Lopes*, *supra* note 2, para. 52; *Case of the Ituango Massacres*, *supra* note 2, para. 114; and *Case of Baldeón García*, *supra* note 2, para. 66.

52. The Court incorporates into the body of evidence, in accordance with the provisions of Article 44(1) of the Rules of Procedure, the documents forwarded by the representative on March 13, 2006 (*supra* para. 27), which were offered by the representative in his requests and arguments brief, and accepted by the Court in an order of February 7, 2006 (*supra* para. 23).

53. In application of the provisions of Article 45(2) of the Rules of Procedure, the Court incorporates into the body of evidence, the documents presented by the Commission and by the representative (*supra* paras. 41 and 43) in response to the President's request for helpful evidence (*supra* para. 39), taking into account the State's observations (*supra* paras. 44 and 45).

54. In accordance with Article 45(1) of the Rules of Procedure, and considering them useful for deciding this case, the Court adds to the body of evidence the document presented by the representative at the end of the public hearing held on April 3, 2006 (*supra* para. 32), the documents submitted as appendixes to his final written arguments (*supra* para. 34), and the document forwarded on August 7, 2006 (*supra* para. 47), taking into account the State's observations, and assesses them with the body of evidence applying the rules of sound criticism.

55. In addition, pursuant to the provisions of Article 45(1) of the Rules of Procedure, the Court incorporates into the body of evidence in this case the Constitution of Chile, Act No. 19,980 of May 29, 2003, Supreme Decree No. 423 of April 5, 1994, and draft Act No. 3773 available on the Senate's web page, because they are useful in the instant case.

Assessment of testimonial and expert evidence

56. With regards to the statements made by the witnesses and expert witnesses proposed by the parties (*supra* paras. 32 and 49), which were not opposed or contested, the Court accepts them and grants them the corresponding probative value. The Court considers that the testimonial statements of Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola (*supra* paras. 32 and 49), which are useful in this case, must be assessed together with all the evidence in the case and not in isolation, since they are alleged victims and have a direct interest in the case.⁴

VI PROVEN FACTS

57. Based on the evidence provided and bearing in mind the statements made by the parties, the Court considers that the following facts have been proved:

The Foreign Investment Committee and the foreign investment mechanism regulated by Legislative Decree No. 600

57(1) Legislative Decree No. 600 of 1974, the text of which was consolidated, coordinated and systematized by Decree No. 523 of the Ministry of Economy, Development and Reconstruction of September 3, 1993, contains the Chilean Foreign

⁴ Cf. *Case of Ximenes Lopes*, *supra* note 2, para. 56; *Case of the Ituango Massacres*, *supra* note 2, para. 124; and *Case of Baldeón García*, *supra* note 2, para. 66.

Investment Statute, which is one of the legal mechanisms for implementing this type of investment, and grants certain benefits to the investor. This Legislative Decree includes provisions regulating “foreign natural and juridical persons and Chileans resident abroad who transfer foreign capital to Chile and who sign a foreign investment contract.”⁵ The Decree regulates foreign investment contracts, the rights and obligations of foreign investors, and the rules and regulations applicable to them, as well as the role of the Foreign Investment Committee and the Executive Vice Presidency.⁶

57(2) The Foreign Investment Committee “is a functionally-decentralized, public-law juridical person, with its own assets [...] linked to the President of the Republic through the Ministry of Economy, Development and Reconstruction.” The Committee is composed of: (1) the Minister of Economy, Development and Reconstruction, who chairs it; (2) the Finance Minister; (3) the Minister for Foreign Affairs; (4) the Minister of the respective sector, in the case of investment applications in areas that involve ministries that are not represented on the Committee; (5) the Minister of Planning and Cooperation, and (6) the President of the Central Bank of Chile.⁷

57(3) This Committee is “the only body authorized, in representation of the State of Chile, to authorize the entry of foreign capital under Decree Law [No. 600] and to establish the terms and conditions of the respective contracts” and is linked to the President of the Republic through the Ministry of Economy, Development and Reconstruction. To fulfill its role and obligations, “the [Foreign Investment] Committee shall be represented by its President in the case of [...] investments that require the agreement of the Committee, as established in Article 16 [of this decree]; otherwise, it will be represented by its Executive Vice President.”⁸

57(4) To fulfill its role and obligations, the Executive Vice Presidency of the Foreign Investment Committee, has the following responsibilities: (a) to receive, examine and report on foreign and other investment applications submitted to the Committee’s consideration; (b) to act as the Committee’s administrative body, preparing the required background material and studies; (c) to carry out information, registration, statistical and coordination functions relating to foreign investment; (d) to centralize information and the reports on the control of the obligations undertaken by foreign investors or the companies in which they are involved exercised by public entities, and to denounce any offense or infraction that comes to its attention before the competent public entities or authorities; (e) to carry out and to facilitate the necessary procedures before the different entities that must provide information or grant authorization before the Committee can take a decision on the different applications, and for due execution of the corresponding contracts and decisions, and (f) to investigate in Chile or abroad the suitability and soundness of the applicants or interested parties.⁹

⁵ Cf. Article 1 of Decree Law No. 600 on the Foreign Investment Statute published on December 16, 1993 (file of appendixes to the requests and arguments brief, appendix 6, folios 1199 to 1212).

⁶ Cf. Decree Law No. 600 on the Foreign Investment Statute published on December 16, 1993 (file of appendixes to the requests and arguments brief, appendix 6, folios 1199 to 1212).

⁷ Cf. Article 13 of Decree Law No. 600 on the Foreign Investment Statute published on December 16, 1993 (file of appendixes to the requests and arguments brief, volume I, appendix 6, folio 1208).

⁸ Cf. Article 12 of Decree Law No. 600 on the Foreign Investment Statute published on December 16, 1993 (file of appendixes to the requests and arguments brief, volume I, appendix 6, folio 1207).

⁹ Cf. Article 15 of Decree Law No. 600 on the Foreign Investment Statute published on December 16, 1993 (file of appendixes to the requests and arguments brief, volume I, appendix 6, folio 1208); and written

57(5) The Foreign Investment Committee receives applications to make foreign investments in Chile through its Vice President; they are accompanied by background information on the applicants. When the applicants are juridical persons, this information consists of: name of the company; type of company; names of the principal shareholders, their nationality, civil status and residence; company domicile; economic activity; financial information for the previous year; registered capital; assets; profits; countries in which the company has investments; legal representative in Chile; economic analysis of the project; sector of the economy; region where the investment will be made; new jobs the project will generate; intended market; amount, purpose and composition of the investment; and information on the company receiving the investment.¹⁰

Concerning the investment contract for the "Río Cóndor Project"

57(6) On March 21 and September 24, 1991, the Foreign Investment Committee issued two agreements approving the foreign investment applications submitted by Cetec Engineering Company Inc. and Sentarn Enterprises Ltd., to invest a capital of US\$180,000,000 (one hundred and eighty million United States dollars).¹¹

57(7) On December 24, 1991, the State of Chile signed a foreign investment contract with Cetec Engineering Company Inc. and Sentarn Enterprises Ltd. (foreign investors) and with Inversiones Cetec-Sel Chile Limitada (company receiving the capital). This contract was signed under Decree Law No. 600 (the Foreign Investment Statute) in order to invest in Chile a capital of US\$180,000,000 (one hundred and eighty million United States dollars). The contract established that this capital would be "surrendered and paid, on one or more occasions" to the company receiving the capital, Inversiones Cetec Cel [sic] Chile Ltda., so that the latter could use it in "the work of the design, construction and operation of a forestry exploitation project in the twelfth region," known as the "Río Cóndor Project." This project "involve[d] the development of a comprehensive forestry complex, composed of a mechanized sawmill, a timber-processing plant, manufacture of boards and planks, a lumber chip recovery plant [and] an energy plant [...]."¹² The project had a "significant environmental impact" and gave rise to public debate.¹³

57(8) The Foreign Investment Committee approved the foreign investment application based on the examination of the background information provided by the investors.¹⁴ An

statement made by the witness, Andrés Emilio Culagovski Rubio, on March 10, 2006 (file on merits, volume III, folio 815).

¹⁰ Cf. Foreign investment request form (file on merits, volume III, appendix to the written statement made by the expert witness, Claudio Francisco Castillo Castillo, on March 13, 2006 folios 897 to 901).

¹¹ Cf. Foreign investment contract of December 24, 1991 (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 2, folio 2045).

¹² Cf. Foreign investment contract of December 24, 1991 (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 2, folio 2046).

¹³ Cf. Testimony given by Marcel Claude Reyes before the Inter-American Court during the public hearing held on April 3, 2006; and testimony given by Eduardo Moyano Berrios before the Inter-American Court during the public hearing held on April 3, 2006.

¹⁴ Cf. Testimony given by Eduardo Moyano Berrios before the Inter-American Court during the public hearing held on April 3, 2006; written statement made by the witness, Andrés Emilio Culagovski Rubio, on March 10, 2006 (file on merits, reparations, and costs, volume III, folio 817); written statement made by the witness, Liliana Guiditta Macchiavello Martini, on March 10, 2006 (file on merits, reparations, and costs, volume

investment of approximately US\$33,729,540 (thirty-three million seven hundred and twenty-nine thousand five hundred and forty United States dollars) was made under this investment contract.¹⁵

57(9) On December 15, 1993, after the rights arising from this contract had been ceded several times to other companies that would act as foreign investors,¹⁶ the company receiving the investment, Inversiones Cetec-Sel Chile Ltda. changed its name to Forestal Trillium Ltda. (hereinafter "Forestal Trillium") and, on March 15, 1999, changed its name again to Forestal Savia Limitada.¹⁷

57(10) On August 28, 2002, and October 10, 2003, the foreign investor, Bayside Ltd., and the State of Chile signed two foreign investment contracts authorizing a capital investment of US\$10,000,000 (ten million United States dollars) and US\$5,000,000 (five million United States dollars), "to be surrendered and paid to increase the capital of the company FORESTAL SAVIA LIMITADA, formerly FORESTAL TRILLIUM LIMITADA, which is developing the Río Cóndor forestry exploitation project in the twelfth region." The contract indicated that the investment authorization was "without prejudice to any other [authorizations] that [...] might be required from the competent authorities."¹⁸

57(11) The Río Cóndor Project was not executed; hence, Forestal Savia Limitada (formerly Forestal Trillium), which was the "receiver of the capital flows of the accredited foreign investor companies," did not implement the project.¹⁹

Concerning Marcel Claude Reyes and Arturo Longton Guerrero's request for information from the Foreign Investment Committee and the latter's response

57(12) Marcel Claude Reyes is an economist. In 1983, he worked in the Central Bank as an adviser to the Foreign Investment Committee and in the Environmental Accounts Unit; also, he was Executive Director of the Terram Foundation from 1997 to 2003. One of the purposes of this non-governmental organization was to promote the capacity of civil

III, folio 826); and expert opinion given by Roberto Mayorga Lorca before the Inter-American Court during the public hearing held on April 3, 2006.

¹⁵ Cf. Report by Karen Poniachik, Executive Vice President of the Foreign Investment Committee, dated June 20, 2005 (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 1, folio 2041).

¹⁶ Cf. Contract transferring foreign investment rights from Cetec Engineering Company Inc. and Sentarn Enterprises Ltd. to Zuñirse Holding Ltd., dated April 12, 1993 (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 2, folios 2099 to 2105).

¹⁷ Cf. Report by Karen Poniachik, Executive Vice President of the Foreign Investment Committee, dated June 20, 2005 (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 1, folio 2041); and registration No. 787/99 concerning change in company (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 2, folio 2109).

¹⁸ Cf. Foreign investment contracts of August 28, 2002, and October 10, 2003 (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 2, folios 2115 and 2120).

¹⁹ Cf. Newspaper article entitled "*Victoria Parcial Contra el Secretismo*" published in "*El Mercurio*" on July 10, 2005 (file of appendixes to the requests and arguments brief, appendix 10, folios 1637 and 1638); brief answering the application and with observations on the requests and arguments brief, and requests and arguments brief (file on merits and possible reparations and costs, volume I, folios 130, 197 and 198); and testimony given by Marcel Claude Reyes before the Inter-American Court during the public hearing held on April 3, 2006.

society to respond to public decisions on investments related to the use of natural resources, and also "to play an active role in public debate and in the production of solid, scientific information [...] on the sustainable development of [Chile]."²⁰

57(13) On May 7, 1998, Marcel Claude Reyes, as Executive Director of the Terram Foundation, sent a letter to the Executive Vice President of the Foreign Investment Committee, indicating that the foundation proposed "to evaluate the commercial, economic and social aspects of the [Rio Condor] project, assess its impact on the environment [...] and exercise social control regarding the actions of the State entities that are or were involved in the development of the Río Cóndor exploitation project."²¹ In this letter, the Executive Director of the Terram Foundation requested the Foreign Investment Committee to provide the following information "of public interest":²²

1. Contracts signed by the State of Chile and the foreign investor concerning the Río Cóndor project, with the date and name of the notary's office where they were signed and with a copy of such contracts.
2. Identity of the foreign and/or national investors in this project.
3. Background information from Chile and abroad that the Foreign Investment Committee had before it, which ensured the soundness and suitability of the investor(s), and the agreements of the Committee recording that this information was sufficient.
4. Total amount of the investment authorized for the Río Cóndor project, method and timetable for the entry of the capital, and existence of credits associated with the latter.
5. Capital effectively imported into the country to date, as the investors' own capital, capital contributions and associated credits.
6. Information held by the Committee and/or that it has requested from other public or private entities regarding control of the obligations undertaken by the foreign investors or the companies in which they are involved and whether the Committee is aware of any infraction or offense.
7. Information on whether the Executive Vice President of the Committee has exercised the power conferred on him by Article 15 bis of D[ecree Law No.] 600, by requesting from all private and public sector entities and companies, the reports and information he required to comply with the Committee's purposes and, if so, make this information available to the Foundation."²³

²⁰ Cf. Letter dated May 7, 1998, from the Executive Director of the Terram Foundation to the Executive Vice President of the Foreign Investment Committee (file of appendixes to the application, appendix 1(1), folios 40 and 41); testimony given by Marcel Claude Reyes before the Inter-American Court during the public hearing held on April 3, 2006; and print-out of some links on the Terram Foundation web page of August 9, 2000 (file before the Commission, volume II, folio 429).

²¹ Cf. Letter dated May 7, 1998, from the Executive Director of the Terram Foundation to the Executive Vice President of the Foreign Investment Committee (file of appendixes to the application, appendix 1(1), folios 40 and 41); and testimony given by Marcel Claude Reyes before the Inter-American Court during the public hearing held on April 3, 2006.

²² Cf. Letter dated May 7, 1998, from the Executive Director of the Terram Foundation to the Executive Vice President of the Foreign Investment Committee (file of appendixes to the application, appendix 1(1), folios 40 and 41).

²³ Cf. Request for information of May 7, 1998, from the Executive Director of the Terram Foundation to the Executive Vice President of the Foreign Investment Committee (file of appendixes to the application, appendix 1(1), folios 40 and 41).

57(14) On May 19, 1998, the Executive Vice President of the Foreign Investment Committee met with Marcel Claude Reyes and Deputy Arturo Longton Guerrero.²⁴ The Vice President handed them “a sheet with the name of the investor, the company name, and the amount of capital he had asked to import into the country”²⁵ when the project was approved, the companies involved, the investments made to date, the type of project and its location.²⁶

57(15) On May 19, 1998, the Executive Vice President of the Foreign Investment Committee sent Marcel Claude Reyes a one-page letter, via facsimile, in which he stated that “with regard to our conversation, the figures provided correspond only to capital, which [was] the only item executed. The Project [was] authorized to import ‘associated credits’ of US\$102,000,000, but ha[d] not availed itself of this authorization[, and the authorized capital] amount[ed] to US\$78,500,000.”²⁷

57(16) On June 3 and July 2, 1998, Marcel Claude Reyes sent two letters to the Executive Vice President of the Foreign Investment Committee, in which he reiterated his request for information, based on “the obligation of transparency to which State agents are subject and the right of access to public information established in the State’s Constitution and in the international treaties signed and ratified by Chile.” In addition, Mr. Claude Reyes indicated in these letters that he had “not received an answer from the Foreign Investment Committee to his request,” and made no comment on the information that had been provided (*supra* para. 57(14) and 57(15)).²⁸

57(17) The Vice President of the Foreign Investment Committee did not adopt a written decision justifying the refusal to provide the information requested in sections 3, 6 and 7 of the original request for information (*supra* para. 57(13)).²⁹

57(18) On June 30, 2005, during the proceedings before the Inter-American Commission (*supra* para. 13), the State forwarded the Commission a copy of the foreign investment contracts and the assignment contracts relating to the “Río Condor” project.³⁰

²⁴ Cf. Testimony given by Marcel Claude Reyes before the Inter-American Court during the public hearing held on April 3, 2006; testimony given by Eduardo Moyano Berrios before the Inter-American Court during the public hearing held on April 3, 2006; and written statement made by the witness, Arturo Longton Guerrero of March 2006 (file on merits reparations, and costs,, volume III, folio 915).

²⁵ Cf. Testimony given by Marcel Claude Reyes before the Inter-American Court during the public hearing held on April 3, 2006.

²⁶ Cf. Written statement made by the witness, Liliana Guiditta Macchiavello Martini on March 10, 2006 (file on merits, volume III, folio 828); and testimony given by Eduardo Moyano Berrios before the Inter-American Court during the public hearing held on April 3, 2006.

²⁷ Cf. Copy of the facsimile letter of May 19, 1998, from the Executive Vice President of the Foreign Investment Committee to Marcel Claude Reyes (file of appendixes to the application, appendix 2, folio 48); and testimony given by Marcel Claude Reyes before the Inter-American Court during the public hearing held on April 3, 2006.

²⁸ Cf. Letters of June 3 and July 2, 1998, from Marcel Claude Reyes to the Executive Vice President of the Foreign Investment Committee (appendixes to the application, appendixes 1(2) and 1(3), folios 43 and 46); testimony given by Marcel Claude Reyes before the Inter-American Court during the public hearing held on April 3, 2006; and testimony given by Eduardo Moyano Berrios before the Inter-American Court during the public hearing held on April 3, 2006.

²⁹ Cf. Testimony given by Marcel Claude Reyes before the Inter-American Court during the public hearing held on April 3, 2006; testimony given by Eduardo Moyano Berrios before the Inter-American Court during the public hearing held on April 3, 2006; and brief of August 13, 1999, presented by the State of Chile during the proceedings before the Inter-American Commission on Human Rights (file before the Inter-American Commission on Human Rights, volume II, folios 908 to 910).

57(19) The State provided Mr. Claude Reyes and Mr. Longton Guerrero with the information corresponding to sections 1, 2, 4 and 5 of the original request for information orally and in writing (*supra* para. 57(13)).³¹

57(20) On April 3, 2006, the Executive Vice President of the Foreign Investment Committee at the time when Mr. Claude Reyes submitted his request for information, stated during the public hearing held before the Inter-American Court, *inter alia*, that he had not provided the requested information:

(a) On section 3 (*supra* para. 57(13)), because “the Foreign Investment Committee [...] did not disclose the company’s financial data, since providing this information was contrary to the public interest,” which was “the country’s development.” “It was not reasonable that foreign companies applying to the Foreign Investment Committee should have to disclose their financial information in this way; information that could be very important to them in relation to their competitors; hence, this could have been an obstacle to the foreign investment process.” It was the Foreign Investment Committee’s practice not to provide a company’s financial data that could affect its competitiveness to third parties. The Committee and the Vice President defined what was in the public interest;

(b) On section 6 (*supra* para. 57(13)), because information on the background material that the Committee could request from other institutions “did not exist” and the Committee “does not having policing functions”; and

(c) On section 7 (*supra* para. 57(13)), because “the Foreign Investment Committee had neither the responsibility nor the capacity to evaluate each project on its merits; it had a staff of just over 20 persons. Furthermore, this was not necessary, since the role of the Foreign Investment Committee is to authorize the entry of capitals and the corresponding terms and conditions, and the country had an institutional framework for each sector.”³²

Concerning the practice of the Vice Presidency of the Foreign Investment Committee with regard to providing information

57(21) Up until 2002, the Executive Vice Presidency of the Foreign Investment Committee “followed the criteria of providing only its own information.” Its practice was not to provide information on the financial statements of an investment company or the

³⁰ Cf. Report presented by the State to the Inter-American Commission on June 30, 2005 (file before the Commission, volume I, folio 221); and final arguments brief submitted to the Court by the State on May 18, 2006 (file on merits, reparations, and costs, volume IV, folio 1264).

³¹ Cf. Facsimile letter of May 19, 1998, from the Executive Vice President of the Foreign Investment Committee to Marcel Claude Reyes (file of appendixes to the application, appendix 2, folio 48); testimony given by Marcel Claude Reyes before the Inter-American Court during the public hearing held on April 3, 2006; testimony given by Eduardo Moyano Berríos before the Inter-American Court during the public hearing held on April 3, 2006; and application brief presented by the Inter-American Commission (file on merits, reparations, and costs, volume I, folio 54).

³² Cf. Testimony given by Eduardo Moyano Berríos before the Inter-American Court during the public hearing held on April 3, 2006.

names of the shareholders,³³ and it considered that "information regarding third parties, such as commercial information, copyrights and trademarks, use of technology and, in general, the specific characteristics of the investment projects that foreign investors wished to develop were confidential, [...] since this was data of a private nature, belonging to the investor, that could harm his legitimate business expectations if it were made public, and there was no legal source that permitted disclosure."³⁴

57(22) On November 13, 2002, the Ministry of Economy, Development and Reconstruction issued Decision *Exenta* No. 113, published in the official gazette on March 24, 2003. Article 1 of the Decision established that "acts, documents and background information whose disclosure and dissemination could affect the public interest shall be considered of a secret or confidential nature" and, in five subparagraphs, listed the situations envisaged by this Decision. Additionally, Article 2 establishes the circumstances in which acts, documents and background information would be of a secret or confidential nature considering that their disclosure and dissemination could affect the private interests of those concerned.³⁵

Concerning the judicial proceedings

57(23) On July 27, 1998, "Marcel Claude Reyes, personally and in representation of the Terram Foundation, Sebastián Cox Urrejola, personally and in representation of the NGO FORJA, and Arturo Longton Guerrero, personally and as a Deputy of the Republic," filed an application for protection [of constitutional rights] before the Santiago Court of Appeal.³⁶ This recourse was based on the alleged violation by Chile of the right of the appellants to freedom of expression and access to State-held information, guaranteed by Article 19(12) of the Chilean Constitution, in relation to Article 5(2) thereof; Article 13(1) of the American Convention, and Article 19(2) of the International Covenant on Civil and Political Rights. They requested the Court of Appeal to order the Foreign Investment Committee to respond to the request for information and make the information available to the alleged victims within a reasonable time. In the text of this application for protection, the appellants did not refer to the meeting held with the Executive Vice President of the Foreign Investment Committee, or to the information that the latter had given them (*supra* para. 57(14) and 57(15)).

57(24) Article 20 of the Constitution of the Republic of Chile regulates the application for protection, which can be filed by an individual "on his own behalf, or by another person on his behalf" before the respective court of appeal when, "owing to arbitrary or illegal acts or omissions, he suffers denial of, interference with or threat to the legitimate exercise of the rights and guarantees established in specific subparagraphs of Article 19,

³³ Cf. Testimony given by Eduardo Moyano Berríos before the Inter-American Court during the public hearing held on April 3, 2006; and report by Karen Poniachik, Executive Vice President of the Foreign Investment Committee, dated June 20, 2005 (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 1, folio 2041).

³⁴ Cf. Report by Karen Poniachik, Executive Vice President of the Foreign Investment Committee, dated June 20, 2005 (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 1, folio 2042).

³⁵ Cf. Decision *Exenta* [Note: exempt from the control of the Comptroller General's Office] No. 113 of the Ministry of Economy, Development and Reconstruction, published in the official gazette on March 24, 2003, (file of appendixes to the requests and arguments brief, appendix 6, folio 1270).

³⁶ Cf. Application for protection filed by Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero before the Santiago Court of Appeal on July 27, 1998 (file of appendixes to the application, appendix 3, folios 51 and 52).

explicitly described in Article 20. The application for protection shall be admissible also in the case of Article 19(8), when the right to live in an uncontaminated environment shall be affected by an arbitrary or illegal act that can be attributed to a specific authority or individual." In addition, this Article 20 also establishes that the said court "shall adopt forthwith the measures it deems necessary to re-establish the rule of law and ensure the due protection of the person affected, without prejudice to other rights that may be claimed before the corresponding courts or authority."³⁷

57(25) On July 29, 1998, the Santiago Court of Appeal delivered a ruling in which it declared the application for protection that had been filed inadmissible, because "from the facts described [...] and from the background information attached to the application, it is clearly without grounds." In addition, the Court of Appeal stated that it had taken into consideration that "the purpose of the application for protection is to re-establish the rule of law when this has been disrupted by arbitrary or illegal acts or omissions that threaten, interfere with or deny the legitimate exercise of some of the guarantees specifically listed in Article 20 of the Constitution of the Republic, without prejudice to any other legal proceedings." This ruling does not contain any justification other than the one indicated above, and mentions that it is adopted "under the provisions of No. 2 of the Supreme Court's Unanimous Judicial Decision [published on] June 9, [1998]."³⁸

57(26) The Unanimous Judicial Decision of the Supreme Court of Chile "concerning the processing of the application for protection of constitutional guarantees" issued on June 24, 1992, was modified by "Unanimous Judicial Decision concerning the processing of and ruling on the application for protection" of May 4, 1998, published on June 9, 1998. In section No. 2 of the latter, the Supreme Court agreed that "the Court shall examine whether it has been filed opportunely and whether it has sufficient merit to admit it for processing. If, in the unanimous opinion of its members, the presentation is time-barred or suffers from a clear lack of justification, it shall declare it inadmissible by a summary decision, which shall not be susceptible to any type of appeal, except that of an appeal for reconsideration of judgment before the same court."³⁹

57(27) On July 31, 1998, the alleged victims' lawyer filed an appeal for reconsideration of judgment before the Santiago Court of Appeal, in which he requested the Court "to reconsider the ruling of [...] July 29, [1998 ...] annulling it, and declaring the [application for protection] admissible."⁴⁰ In this appeal, in addition to presenting the legal arguments concerning the alleged violation of the right of access to the requested information, he stated that the ruling did not contain a detailed justification of the declaration of inadmissibility and "was not consistent with the provisions of section No. 2 of the Unanimous Judicial Decision concerning the processing of and ruling on the application for protection, which established that "the declaration of inadmissibility must be 'summarily justified.'" In the appeal, the said lawyer indicated that the declaration of

³⁷ Cf. Constitution of the Republic of Chile of August 8, 1980 (helpful evidence incorporated by the Inter-American Court, available at http://www.bcn.cl/pags/legislación/leyes/constitución_politica.htm).

³⁸ Cf. Ruling of the Santiago Court of Appeal of July 29, 1998 (file of appendixes to the application, appendix 4, folio 73).

³⁹ Cf. Decision of the Supreme Court of Chile "concerning the processing of the application for protection of constitutional guarantees" issued on June 24, 1992; and decision of the Supreme Court of Chile "concerning the processing of and ruling on the application for protection" issued on May 4, 1998 (file before the Commission, Volume II, folios 1039 to 1050).

⁴⁰ Cf. Appeal for reconsideration of judgment filed by the alleged victims' lawyer before the Santiago Court of Appeal on July 31, 1998 (file of appendixes to the application, appendix 5, folio 76).

inadmissibility “introduced a violation of the provisions of Article 5(2) of the Constitution, in relation to Article 25 of the American Convention.”

57(28) On July 31, 1998, the alleged victims’ lawyer filed a remedy of complaint before the Supreme Court of Chile against the Justices of the Santiago Court of Appeal who signed the ruling of July 29, 1998 (*supra* para. 57(25)) and asked the Supreme Court to order “the parties against whom the appeal was made to reconsider the ruling as soon as possible and, in brief, admit [the application for protection], immediately repairing the harm that gave rise to it, modifying the wrongfully adopted ruling in accordance with the law, and adopting any other relevant measures pursuant to the law.”⁴¹

57(29) Article 545 of the Basic Court Code establishes that the purpose of the remedy of complaint is “to correct serious shortcomings or abuses committed when issuing rulings of a jurisdictional nature.” It shall only be admissible when the abuse or shortcoming is committed in an interlocutory judgment that ends the proceedings or makes it impossible to continue and that is not eligible for any regular or special recourse.”⁴²

57(30) On August 6, 1998, the Santiago Court of Appeal declared that “the requested reconsideration is inadmissible”⁴³ (*supra* para. 57(27)).

57(31) On August 18, 1998, the Supreme Court declared inadmissible the remedy of complaint filed by the alleged victims’ lawyer (*supra* para. 57(28)), on the basis that “the grounds for admissibility are not present in the case,” because the ruling that declared the application for protection inadmissible (*supra* para. 57(25)), pursuant to the unanimous judicial decision on the processing of and ruling on this application, could be appealed by an appeal for reconsideration of judgment.⁴⁴

Concerning the legal framework of the right of access to State-held information and the confidentiality or secrecy of acts and documents in Chile

57(32) Article 19(12) of the Chilean Constitution ensures to all persons “the freedom to issue an opinion and to provide information, without any prior censorship of any kind and by any means, without prejudice to responding to any offenses or abuses committed in the exercise of these freedoms pursuant to laws enacted by a special quorum.”⁴⁵ This Article also establishes “the right to file petitions before the authorities on any matter of public or private interest, with the sole restriction that this should be done in respectful and appropriate language.”⁴⁶

57(33) Constitutional Organic Law on General Principles of State Administration No. 18,575 of 1986, in force at the time of the facts, did not contain provisions concerning

⁴¹ Cf. Remedy of complaint filed by the alleged victims’ lawyer before the Supreme Court of Chile on July 31, 1998 (file of appendixes to the application, appendix 7, folio 94).

⁴² Cf. Article 545 of the Basic Court Code (file before the Commission, volume II, folio 1054).

⁴³ Cf. Decision of the Santiago Court of Appeal of August 6, 1998 (file of appendixes to the application, appendix 6, folio 89).

⁴⁴ Cf. Judgment delivered by the Supreme Court of Chile on August 18, 1998 (file of appendixes to the application, appendix 8, folio 109).

⁴⁵ Cf. Article 19(12) of the Chilean Constitution, *supra* note 36.

⁴⁶ Cf. Article 19(14) of the Chilean Constitution, *supra* note 36.

the right of access to State-held information and the principles of transparency and disclosure of the Administration. In addition, this law did not establish a procedure for acceding to information held by the administrative entities.⁴⁷

57(34) On April 18, 1994, Supreme Decree No. 423 was published in the official gazette. It created the National Public Ethics Commission, *inter alia*, in order to promote an informed reflection on the issue of public ethics, actively involving the different powers of the State and civil sectors. The decree emphasized the need "to modernize public administration, and to direct the performance of its functions towards fulfillment of its goals, improving the efficiency, productivity and quality of the public services provided."⁴⁸

57(35) On December 14, 1999, Act No. 19,653 concerning "Administrative probity applicable to the body of State Administration" was published in the official gazette of the Republic of Chile. Act No. 19,653 incorporated the principles of probity, transparency and disclosure and established the "right to have recourse to a professionally qualified judge of a civil court," requesting protection of the right to request certain information in writing.⁴⁹ On November 17, 2001, Decree Law 1/19,653 was published, establishing "the consolidated, coordinated and systematized text of Act No. 18,575" (*supra* para. 57(33)). This Act established, *inter alia*, that:⁵⁰

(a) "The administrative acts of the body of State Administration and the documents that directly and essentially substantiate or complement them are public." Disclosure "extends to the reports and background information that private companies offering services to the public, and the companies referred to in the third and fifth subparagraph [...] of the Limited Companies Act provide to State entities responsible for overseeing them, to the extent that this is of public interest, that its dissemination does not affect the proper functioning of the company, and that the owner of the information does not avail himself of his right to refuse access to it";

(b) If the information "is not available to the public permanently, the interested party shall have the right to request it in writing from the head of the respective service";

(c) The head of the service may refuse access to the information for the reasons established in the law, but if he refuses access for a reason other than national security or national interest, the interested party has the right to resort to a professionally qualified judge of a civil court, and an appeal against the judgment delivered by that judge can be made before the respective court of

⁴⁷ Cf. Constitutional Organic Law on General Principles of State Administration No. 18,575 published in the official gazette on December 5, 1986 (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 3, folio 2025 to 2134).

⁴⁸ Cf. Decree No. 423 issued by the Ministry of the Interior on April 5, 1994 (helpful evidence incorporated by the Inter-American Court, available at http://www.chiletransparente.cl/home/doc/DS423_1994.pdf).

⁴⁹ Cf. Act No. 19,653 "Administrative Probity Applicable to the Body of State Administration" (file of appendixes to the application, appendix 9, folio 113).

⁵⁰ Cf. Decree law No. 1/19,653 establishing the consolidated and systematized text of Act No. 18,575, Constitutional Organic Law on General Principles of State Administration (file of appendixes to the requests and arguments brief, appendix 2, folios 1128 to 1157).

appeal. Should the reason invoked be national security or national interest, the appellant's complaint must be filed before the Supreme Court;

(d) If the information requested could affect the rights or interests of third parties, they may oppose the disclosure of the requested documents, by submitting a brief that does not need to state the reason, when they are given the opportunity to do so. Even in the absence of the opposition of third parties, the head of the requested entity may consider that "disclosure of the requested information would substantially affect the rights or interests of the third parties owners of this information";

(e) The head of the requested entity must provide the documentation requested, unless one of the reasons that authorizes him to refuse it is involved. The refusal must be communicated in writing and include the reasons for the decision. The only reasons why the State may refuse to provide documents or background information requested from the Administration are:

- 1) Confidentiality or secrecy established by legal or regulatory provisions;
- 2) That disclosure would impede or hinder due compliance with the functions of the requested entity;
- 3) Timely and appropriately-presented opposition by the third parties to which the information contained in the requested documents refers or who are affected by it;
- 4) That disclosure or delivery of the requested documents or background information affects the rights or interests of third parties substantially, based on a justified opinion of the head of the requested entity; and
- 5) That disclosure would affect national security or interest.

(f) One or more regulations shall establish the cases of secrecy or confidentiality of the documentation and background information that are held by the body of State Administration.

57(36) On January 28, 2001, the Minister-Secretary General of the Presidency promulgated Supreme Decree No. 26, with the Regulations on the secrecy or confidentiality of acts and documents of the State Administration; it was published on May 7, 2001. These Regulations establish that, for an administrative entity to provide the requested information, this should refer to administrative acts or to documents that directly and essentially substantiate them or complement them.⁵¹ It also defines what should be understood by administrative act, document, supporting document, directly substantiating or complementary document, essentially substantiating or complementary document, and acts or documents that are permanently available to the public.⁵² In addition, this regulation establishes that:

(a) The reports are public of private companies that provide services, or State-owned companies, or limited companies in which the State appoints two or more

⁵¹ Cf. Article 2 of the Regulations on the secrecy or confidentiality of acts and documents of the State Administration (file of appendixes to the requests and arguments brief, volume I, appendix 3, folio 1159).

⁵² Cf. Article 3(d) and (e) of the Regulations on the secrecy or confidentiality of acts and documents of the State administration (file of appendixes to the requests and arguments brief, volume I, appendix 3, folios 1159 to 1163).

directors, to the extent that the requested documentation corresponds to reports and background information that these companies provide to the State entities responsible for overseeing them; that the background material and reports are of public interest; that their divulgation does not affect the proper functioning of the company; and that the holder of the information does not avail himself of his right to refuse access to it;⁵³

(b) Acts and documents that have been published integrally in the official gazette and that are included in the register that each service must keep are permanently available to the public;⁵⁴

(c) The declaration of secrecy or confidentiality is made by the head of the service in a reasoned decision;⁵⁵

(d) "Secret" acts and documents shall only be disclosed to the authorities or persons to whom they are addressed and to those who must intervene in their examination and related decisions. "Confidential" acts and documents shall be disclosed only within the unit of the entity to which they are sent;⁵⁶

(e) "Only acts and documents whose disclosure and dissemination could affect the public or private interest of the owner of the information may be declared secret or confidential," pursuant to the provisions of Article 8 of the regulations, which incorporate into public interest, reasons for confidentiality such as defense, national security, foreign policy, international relations, monetary policy, and into private interest, reasons for confidentiality such as files on punitive or disciplinary procedures of any nature, and medical or health files;⁵⁷

(f) The body of the State Administration shall classify acts and documents using explicit criteria, according to the required level of protection;⁵⁸ and

(g) The acts and documents of a "confidential" or "secret" nature shall retain this characteristic for 20 years, unless the head of the respective service excludes them from these categories by a reasoned decision.⁵⁹

⁵³ Cf. Article 2 of the Regulations on the secrecy or confidentiality of acts and documents of the State administration (file of appendixes to the requests and arguments brief, volume I, appendix 3, folios 1159 to 1163).

⁵⁴ Cf. Article 3(f) of the Regulations on the secrecy or confidentiality of acts and documents of the State administration (file of appendixes to the requests and arguments brief, volume I, appendix 3, folios 1159 to 1163).

⁵⁵ Cf. Article 9 of the Regulations on the secrecy or confidentiality of acts and documents of the State administration (file of appendixes to the requests and arguments brief, volume I, appendix 3, folio 1962).

⁵⁶ Cf. Article 7 of the Regulations on the secrecy or confidentiality of acts and documents of the State administration (file of appendixes to the requests and arguments brief, volume I, appendix 3, folio 1961).

⁵⁷ Cf. Article 8 of the Regulations on the secrecy or confidentiality of acts and documents of the State administration (file of appendixes to the requests and arguments brief, volume I, appendix 3, folio 1961).

⁵⁸ Cf. Article 9 of the Regulations on the secrecy or confidentiality of acts and documents of the State administration (file of appendixes to the requests and arguments brief, volume I, appendix 3, folio 1962).

⁵⁹ Cf. Article 10(e) of the Regulations on the secrecy or confidentiality of acts and documents of the State administration (file of appendixes to the requests and arguments brief, volume I, appendix 3, folio 1963).

57(37) Following the entry into force of Supreme Decree No. 26 establishing the regulations on the secrecy or confidentiality of acts and documents of the State Administration (*supra* para. 57(36)), approximately 90 decisions were issued granting secrecy or confidentiality to a series of administrative acts, documents and background information held by State entities.⁶⁰

57(38) On May 29, 2003, Act No. 19,880⁶¹ on administrative procedures was published, incorporating the principle of disclosure in its Articles 16, 17(a) and (d), and 39. Article 16 stipulates that “with the exceptions established by law or the regulations, the administrative acts of the body of the State Administration and the documents that directly or essentially substantiate or complement them, are public.”

57(39) On October 4, 2004, the Comptroller General’s Office issued Opinion No. 49,883,⁶² in response to a request filed by several individuals and organizations who contested the legality of 49 decisions concerning declarations of secrecy or confidentiality. This opinion stated that “numerous decisions exceed the laws and regulations by declaring the secrecy and confidentiality of other types of issues,” and that “several decisions establish matters subject to secrecy or confidentiality in such broad terms that it cannot be understood that they are protected by the legal and regulatory provisions on which they should be based.” In this opinion, the Comptroller General’s Office stated that “it should be observed that some decisions do not include the precise justification for declaring certain documents secret or confidential.” Based on the above, the Comptroller General’s Office ordered peremptorily all Government departments to “re-examine [such decisions] as soon as possible [...] and, when applicable, modify them to adapt them to the legal provisions on which they are based.”

57(40) On January 4, 2005, two senators presented a draft law on access to public information.⁶³ In the preambular paragraphs, it stated that “[d]espite legislative efforts [in the 1999 Probity Act and Act No. 19,880 of May 29, 2003], in practice, the principles of transparency and access to public information are severely limited, converting these laws into dead letter [...], owing to the fact that the Probity Act itself stipulates that one or more regulations shall establish the cases of secrecy or confidentiality of the documentation and background information held by the State Administration, and this constitutes a significant barrier to the right of access to public information established by law.”

⁶⁰ Cf. Administrative decisions of various State bodies that classify information as secret or confidential (file of appendixes to the requests and arguments brief, volume I, appendix 4, folios 1164 to 1184); Open Society Institute and PARTICIPA, Chilean Report “Monitoring the Access to Public Information,” November 2004 (file of appendixes to the requests and arguments brief, appendix 9, folios 1615 to 1634); and expert opinion given by Carlos Carmona Santander before the Inter-American Court during the public hearing held on April 3, 2006.

⁶¹ Cf. Act No. 19,980 published in the official gazette of May 29, 2003 (helpful evidence incorporated by the Inter-American Court, available at <http://www.conicyt.cl/directorio/legislacion/ley19980.html>).

⁶² Cf. Opinion No. 49,883 of October 4, 2004 (file of appendixes to the requests and arguments brief, volume I, appendix 5, folios 1186 to 1196).

⁶³ Cf. Draft Act No. 3773-06 on Access to Public Information (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 7, folios 2261 to 2270); and draft Act No. 3773-06 on Access to Public Information (helpful evidence incorporated by the Inter-American Court, available at <http://sil.senado.cl/pags/index.html>).

57(41) On August 26, 2005, Act No. 20,050 reforming the Chilean Constitution entered into force. Among other substantial reforms, it incorporated a new Article 8, which established that:

The exercise of public functions obliges officials to comply strictly with the principle of probity in all their actions. The acts and decisions of the body of the State are public, and also their justification and the procedures used. Only a law with a special quorum can establish their secrecy or confidentiality when disclosure would affect due compliance with the functions of these entities, the rights of the individual, or national security or interest.⁶⁴

The fifth transitory provision of the Chilean Constitution establishes that “[i]t shall be understood that the laws in force on issues relating to this Constitution shall be the object of constitutional organic laws or laws adopted by a special quorum, shall comply with these requirements, and shall continue to be applied, provided they are not contrary to the Constitution, until the corresponding laws have been issued.”⁶⁵

57(42) On October 7, 2005, the Senate of the Republic of Chile adopted the draft law on access to public information modifying Decree Law No. 1 which had established the consolidated, coordinated and systematized text of the Organic Law on General Principles of State Administration, in order to “achieve a high level of transparency in the exercise of public functions [and encourage] increased and more effective civic participation in public matters.”⁶⁶ This draft law is currently at its second constitutional stage.

57(43) On December 12, 2005, the Ministry-General Secretariat of the Presidency issued Decree No. 134, derogating Supreme Decree No. 26 of 2001 (*supra* para. 57(36)), on the basis that, following the reform introduced by the new Article 8 of the Constitution (*supra* para. 57(40)) the content of the said Decree “was now contrary to the Constitution and, hence, could not continue to be law.”⁶⁷

57(44) On January 30, 2006, the Minister-Secretary General of the Presidency sent an official communication to several State authorities with “guidelines describing the applicable criteria and rules on disclosure and access to administrative information,” because, as a “result of the derogation of Decree No. 26,] all the decisions issued under this regulation establishing cases for the secrecy and confidentiality of acts and documents of the Administration had also been tacitly derogated.”⁶⁸

57(45) On February 15, 2006, the Presidential Advisory Committee for the Protection of Human Rights⁶⁹ informed the Court that “it had taken the initiative to unofficially urge

⁶⁴ Cf. Act No. 20,050 published in the official gazette on August 26, 2005 (file of appendixes to the requests and arguments brief, appendix I, folios 1088 to 1107).

⁶⁵ Cf. Fifth Transitory Provision of the Chilean Constitution, *supra* note 36.

⁶⁶ Cf. Draft Act No. 3773-06 on Access to Public Information (file of appendixes to the brief answering the application and with observations on the requests and arguments brief, appendix 7, folios 2261 to 2270); and draft Act No. 3773-06 on Access to Public Information (helpful evidence incorporated by the Inter-American Court, available at <http://sil.senado.cl/pags/index.html>).

⁶⁷ Cf. Decree No. 134 issued on December 12, 2005, by the Ministry-General Secretariat of the Presidency (file on merits, reparations, and costs, volume II, folio 539).

⁶⁸ Cf. Undated letter signed by the Minister-Secretary General of the Presidency (file on merits, reparations, and costs, volume II, folio 541).

⁶⁹ Cf. Supreme Decree No. 65 of May 11, 2001 (file of appendixes to the requests and arguments brief, appendix I, folios 1088 to 1107); and report issued on February 15, 2006, by the Chairman of the Presidential

some entities of the State Administration to respond to requests for information made by individuals and, particularly, non-profit organizations." However, the Committee advised that, in general, the initiative had been "unsuccessful, because the laws in force on this issue assign decisions on conflicts between those requesting information and the requested public service to special administrative-law proceedings. [...] Since the decision on whether it is admissible to disclose the public information requested by the individual is reserved to a court, the logical inclination of the heads of service faced with this type of request is to wait until the competent court orders it," since, this will ensure that "they are exempted from responsibility in case of possible claims by third parties."⁷⁰

REGARDING COSTS AND EXPENSES

57(46) The alleged victims and their representative incurred expenses while processing the case before the domestic courts, and also during the international proceedings (*infra* para. 167).

VII VIOLATION OF ARTICLE 13 OF THE AMERICAN CONVENTION REGARDING TO ARTICLES 1(1) AND 2 THEREOF (FREEDOM OF THOUGHT AND EXPRESSION)

The Commission's arguments

58. Regarding the alleged violation of Article 13 of the Convention, regarding Articles 1(1) and 2 thereof, the Commission indicated that:

(a) The disclosure of State-held information should play a very important role in a democratic society, because it enables civil society to control the actions of the Government to which it has entrusted the protection of its interests. "Article 13 of the Convention should be understood as a positive obligation on the part of the State to provide access to the information it holds"; this is necessary to avoid abuses by government officials, to promote accountability and transparency within the State, and to allow a substantial and informed public debate that ensures there are effective recourses against such abuses;

(b) There is a growing consensus that States have the positive obligation to provide the information they hold to their citizens. "The Commission has interpreted Article 13 to include a right of access to State-held information";

(c) "According to the broad terms of Article 13, the right of access to information should be governed by the 'principle of maximum disclosure.'" "The burden of proof corresponds to the State, which must demonstrate that restrictions to access to information are compatible with the inter-American

Advisory Committee for the Protection of Human Rights (file on merits, reparations, and costs, volume II, folios 554 and 556).

⁷⁰ Cf. Report issued on February 15, 2006, by the Chairman of the Presidential Advisory Committee for the Protection of Human Rights (file on merits, reparations, and costs, volume II, folios 554 and 556); and written statement made by the expert witness Davor Harasic on March 7, 2006 (file on merits, reparations, and costs, volume II, folios 509 to 518).

provisions on freedom of expression." "This means that the restriction must not only be related to one of the [legitimate] objectives [that justify it], but it must also be shown that disclosure could cause substantial prejudice to this objective and that the prejudice to the objective is greater than the public interest in having the information" (evidence of proportionality);

(d) Most States of the Americas have regulations concerning access to information. The respective Chilean laws were not applied in this case because they were promulgated after the facts that gave rise to the petition. "The State of Chile has made a series of legislative modifications; however[, ...] these do not guarantee effective and broad access to public information." "The exceptions established by law [...] grant an excessive degree of discretionality to the official who determines whether or not the information is disclosed";

(e) In the instant case, the Commission focused its attention on the information concerning the FIC assessment of the pertinence of the foreign investors, which was not provided to the alleged victims, and which was not officially refused;

(f) Regarding the State's argument that, if the type of information requested had been revealed to the alleged victims, it would have violated the right to confidentiality of the companies concerned, it should be recalled that restrictions to the right to seek, receive and impart information must be expressly established by law. "The State has not cited any provision of Chilean legislation or any legal precedent which expressly establishes that information on the decision-making procedure of the Foreign Investment Committee is confidential." The decision to retain information appears to be "totally at the discretion of the Vice President of the Foreign Investment Committee." Additionally, in its answer to the application, the State departs from the line of argument on confidentiality, alleging that the Foreign Investment Committee did not have the time, capacity or legal powers to investigate the circumstances of the investors;

(g) The Foreign Investment Committee never provided a written response with regard to the missing information and has not shown how retaining the information in question was "necessary" to achieve one of the legitimate objectives established in Article 13 of the Convention. Moreover, it never presented any argument to prove that the disclosure of the information would have resulted in substantial prejudice to these objectives, and that this prejudice was greater than the public interest of disclosing the information as required by the said Article 13. In addition, the State's assertion that the role of controlling Government entities is the exclusive competence of Congress is "unsustainable"; and

(h) "The Chilean State did not guarantee the right of the [alleged] victims of access to information because a State entity refused access to information without proving that it was included in one of the legitimate exceptions to the general rule of disclosure established in Article 13. Also, when the facts that gave rise to this application occurred, the State did not have mechanisms to ensure the right of access to information effectively."

The arguments of the alleged victims' representative:

59. Regarding the alleged violation of Article 13 of the Convention, in relation to Articles 1(1) and 2 thereof, the representative stated that:

(a) The State refused to provide the alleged victims with information it held without giving any reason. The State justified this refusal before the Court by the fact that there was a legal vacuum as regards the confidentiality of the information companies provided to the Foreign Investment Committee. This reason violates the presumption of the maximum disclosure of information and the principles of proportionality and need imposed on restrictions to the right to freedom of expression. The failure to provide the information was decided without prior consultation with the company eventually affected by the disclosure of the information, and the State did not demonstrate to the Court the extent to which the requested information might have affected the rights of Forestal Trillium Ltda. or the State's foreign investment promotion policy;

(b) It has been shown that the Foreign Investment Committee is supposed to investigate foreign investors. By reserving to itself the assessment of investors, the State failed to guarantee to society the corporate credibility of the investors and their investment;

(c) The implicit recognition of the failure to investigate and the refusal of information by the Committee violate the right of access to information included in the right to freedom of expression, because, in sensitive areas that affect the country's natural resources, public interest requires the State to adopt additional and complementary protection measures designed to ensure the suitability and soundness of those who invest in the country. The State has the positive obligation to generate and disclose public information so as to encourage democratic debate and control by civil society; and

(d) The legislative measures taken by the State do not exempt it from international responsibility, because the failure to provide a response and to disclose the information on the suitability of the foreign investor, and also the denial of justice by the national courts, are consummated facts that violate rights embodied in the Convention. Also, even though the constitutional reform that tacitly annulled the 2001 regulations on secrecy and confidentiality was a step forward, it was incomplete; it hinders, restricts and limits the exercise of the right of access to public information and includes grounds for restrictions that are incompatible with Article 13 of the Convention. This reform and also the one that is currently being discussed in Congress do not recognize the right of access to information as an element of the right to freedom of expression as established in Article 13 of the American Convention, but rather as "an element expressing the general interest of the principles of disclosure and probity."

The State's arguments

60. Regarding the alleged violation of Article 13 of the Convention, in relation to Articles 1(1) and 2 thereof, the State indicated that:

(a) In relation to the alleged refusal of information by the Foreign Investment Committee with regard to sections 6 and 7 of the request, it is evident from the testimony of Mr. Moyano Berríos and Mr. Mayorca that the Committee did not have that information;

(b) In relation to the information regarding section 3 of the request, at the time of the facts of this case and actually, the Foreign Investment Committee does not have the physical capacity or the legal powers to investigate the circumstances of the investors. "The role of the Foreign Investment Committee is merely to facilitate and approve flows of foreign capital into Chile." It is not the Committee's role "to conduct a prior study to guarantee the technical, legal, financial or economic viability of the economic [investment] projects; this is the task of the investors." All the background information that the Committee has is provided by the investors themselves. "The petitioners asked the Foreign Investment Committee to provide them with information designed to reveal the possible environmental impact of the forestry project" and the Committee did not have this information since it fell within the jurisdiction of the National Environmental Commission;

(c) "When the petitioners submitted their petition (December 1998) and up until 2002, there was no law that regulated the disclosure or confidentiality of the administrative acts of the Foreign Investment Committee or the documents on which such acts were based." The Committee considered that information relating to third parties and, in general, the specific characteristics of the project were confidential because they constituted private background information that, if made public, "could harm legitimate business interests, and in the absence of a legal source that allowed their disclosure";

(d) It has complied with the recommendations made by the Commission in its Report on Merits; namely, to disclose the information requested by the petitioners, to grant adequate reparation to the petitioners, and to adapt its domestic laws to the terms of Article 13 of the Convention;

(e) Regarding the recommendation to disclose the requested information, the Commission refers to providing information in general and, "in its recommendation, omits the information that was handed directly by the Foreign Investment Committee to the alleged victims and which answered four of the seven sections in the request made to this Committee." "The fact that the project in question was never implemented or executed" signifies that the reasons for requesting the information have disappeared and that compliance with the recommendations "is completely out of context." Despite the foregoing, on June 30, 2005, the State "forwarded [...] to the Commission the foreign investment contracts and the contracts assigning them, in relation to the Río Cóndor project of the Trillium forestry company";

(f) With regard to the Commission's second recommendation to grant adequate reparation to the petitioners, the State had informed the Commission that it was "considering [...] a reparation of a symbolic nature that would encompass the situation of rights violations of which they were victims, and also publicize the progress made in the area of access to public information [in Chile], in order to adapt its domestic legislation to the terms of Article 13 of the Convention. The nature and characteristics of this symbolic reparation would have been proposed to the Commission and then advised to the petitioners. This did not occur owing to the Commission's decision to submit the case to the Court's consideration [...].";

(g) Regarding the Commission's third recommendation, the State has adapted its domestic legislation so that it conforms to the provisions of Article 13 of the

Convention. As an example, it mentioned the recent reform of the Constitution, which incorporates the principle of probity and the right of access to public information in its Article 8, and also that "it has recently prepared a draft law designed to improve the legal norms that currently govern the right of access to information, its exercise and limits, and the recourses in cases of abusive, illegal or arbitrary restrictions to its exercise." Likewise, the reasons for refusing to provide the requested documents have been established by Probity Act No. 19,653 and, as a direct consequence of the constitutional reform, "Decree Law No. 26 of the Ministry-General Secretariat of the Presidency establishing the cases in which the body of the Administration could order the secrecy or confidentiality of certain documents or acts in the exercise of their functions, was annulled" to avoid any actions that contradicted the new constitutional provision; and

(h) Examination of the new laws adopted as a result of the Inter-American Commission's recommendations exceeds the purpose and jurisdiction of the Court, because the new norms are not at issue in the instant case.

The Court's findings

61. Article 13 (Freedom of Thought and Expression) of the American Convention establishes, *inter alia*, that:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - a. respect for the rights or reputations of others; or
 - b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

[...]

62. Regarding the obligation to respect rights, Article 1(1) of the Convention stipulates that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

63. Regarding domestic legal effects, Article 2 of the Convention establishes that:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

64. The Court has established that the general obligation contained in Article 2 of the Convention entails the elimination of any type of norm or practice that results in a violation of the guarantees established in the Convention, as well as the issue of norms and the implementation of practices leading to the effective observance of these guarantees.⁷¹

65. In light of the proven facts in this case, the Court must determine whether the failure to hand over part of the information requested from the Foreign Investment Committee in 1998 constituted a violation of the right to freedom of thought and expression of Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero and, consequently, a violation of Article 13 of the American Convention.

66. With regard to the specific issues in this case, it has been proved that a request was made for information held by the Foreign Investment Committee, and that this Committee is a public-law juridical person (*supra* para. 57(2) and 57(13) to 57(16)). Also, that the requested information related to a foreign investment contract signed originally between the State and two foreign companies and a Chilean company (which would receive the investment), in order to develop a forestry exploitation project that caused considerable public debate owing to its potential environmental impact (*supra* para. 57(7)).

67. Before examining whether the restriction of access to information in this case led to the alleged violation of Article 13 of the American Convention, the Court will determine who should be considered alleged victims, and also define the subject of the dispute concerning the failure to disclose information.

68. In relation to determining who requested the information that, in the instant case, it is alleged was not provided, both the Commission and the representative stated that the alleged victims were Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola. They also indicated that the State violated their right of access to public information because it refused to provide them with the requested information and failed to offer a valid justification. In this respect, Mr. Cox Urrejola affirmed in his written statement "that together with Marcel Claude and Arturo Longton, [he] presented the request for information to the Foreign Investment Committee [in] May 1998" (*supra* para. 48). While, Arturo Longton, in his written statement, indicated that, during the meeting held on May 19, 1998, he requested "several elements of information regarding the foreign investor involved [...] and, in particular, the background information that demonstrated his suitability and soundness" (*supra* para. 48).

69. In the instant case, in which violation of the right to accede to State-held information is alleged, in order to determine the alleged victims, the Court must examine their requests for information and those that were refused

70. From examining the evidence, it is clear that Marcel Claude Reyes, as Executive Director of the Terram Foundation, requested information from the Foreign Investment Committee (*supra* para. 57(13), 57(14) and 57(16)), and also that Arturo Longton Guerrero participated in the meeting held with the Vice President of this Committee (*supra* para. 57(14)) when information was requested, part of which has not been

⁷¹ Cf. *Case of Ximenes Lopes*, *supra* note 2, para. 83; . *Case of Gómez Palomino*. Judgment of November 22, 2005. Series C No. 136, para. 91; . *Case of the "Mapiripán Massacre"*. Judgment of September 15, 2005. Series C No. 134, para. 109; and *Juridical Condition and Rights of Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, para. 78.

provided to them. The State did not present any argument to contest that Mr. Longton Guerrero requested information from the Committee which he has not received. As regards, Sebastián Cox Urrejola, the Court considers that the Commission and the representatives have not established what the information was that he requested from the Foreign Investment Committee which was not given to him; merely that he recently took part in filing an application for protection before the Santiago Court of Appeal (*supra* para. 57(23)).

71. In view of the above, the Court will examine the violation of Article 13 of the American Convention in relation to Marcel Claude Reyes and Arturo Longton Guerrero, since it has been proved that they requested information from the Foreign Investment Committee.

*

Information that was not provided (subject of the dispute)

72. The Court emphasizes that, as has been proved – and acknowledged by the Commission, the representative, and the State – the latter provided information corresponding to four of the seven sections included in the letter of May 7, 1998 (*supra* para. 57(13), 57(14), 57(15) and 57(19)).

73. The Court considers it evident that the information the State failed to provide was of public interest, because it related to the foreign investment contract signed originally between the State and two foreign companies and a Chilean company (which would receive the investment), in order to develop a forestry exploitation project that caused considerable public debate owing to its potential environmental impact (*supra* para. 57(7)). In addition, this request for information concerned verification that a State body – the Foreign Investment Committee – was acting appropriately and complying with its mandate.

74. This case is not about an absolute refusal to release information, because the State complied partially with its obligation to provide the information it held. The dispute arises in relation to the failure to provide part of the information requested in sections 3, 6 and 7 of the said letter of May 7, 1998 (*supra* para. 57(13) and 57(17)).

*

* *

A) *Right to freedom of thought and expression*

75. The Court's case law has dealt extensively with the right to freedom of thought and expression embodied in Article 13 of the Convention, by describing its individual and social dimensions, from which it has deduced a series of rights that are protected by this Article.⁷²

⁷² Cf. . *Case of López Álvarez*. Judgment of February 1, 2006. Series C No. 141, para. 163; . *Case of Palamara Iribarne*. Judgment of November 22, 2005. Series C No. 135, para. 69; . *Case of Ricardo Canese*. Judgment of August 31, 2004. Series C No. 111, paras. 77-80; . *Case of Herrera Ulloa*. Judgment of July 2, 2004. Series C No. 107, paras. 108-111; . *Case of Ivcher Bronstein*. Judgment of February 6, 2001. Series C No. 74, paras. 146-149; . *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.)*. Judgment of February 5, 2001. Series C No. 73, paras. 64-67; and *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, paras. 30-33 and 43.

76. In this regard, the Court has established that, according to the protection granted by the American Convention, the right to freedom of thought and expression includes "not only the right and freedom to express one's own thoughts, but also the right and freedom to *seek, receive and impart* information and ideas of all kinds."⁷³ In the same way as the American Convention, other international human rights instruments, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, establish a positive right to seek and receive information.

77. In relation to the facts of the instant case, the Court finds that, by expressly stipulating the right to "seek" and "receive" "information," Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State.⁷⁴

78. In this regard, it is important to emphasize that there is a regional consensus among the States that are members of the Organization of American States (hereinafter "the OAS") about the importance of access to public information and the need to protect it. This right has been the subject of specific resolutions issued by the OAS General Assembly.⁷⁵ In the latest Resolution of June 3, 2006, the OAS General Assembly, "urge[d] the States to respect and promote respect for everyone's access to public information and to promote the adoption of any necessary legislative or other types of provisions to ensure its recognition and effective application."⁷⁶

79. Article 4 of the Inter-American Democratic Charter⁷⁷ emphasizes the importance of "[t]ransparency in government activities, probity, responsible public administration on the part of Governments, respect for social rights, and freedom of expression and of the

⁷³ Cf. *Case of López Álvarez*, *supra* note 72, para. 163; . *Case of Ricardo Canese*, *supra* note 72, para. 77; and . *Case of Herrera Ulloa*, *supra* note 72, para. 108.

⁷⁴ Cf. . *Case of López Álvarez*, *supra* note 72, para. 163; . *Case of Ricardo Canese*, *supra* note 72, para. 80; and . *Case of Herrera Ulloa*, *supra* note 72, paras. 108-111.

⁷⁵ Cf. Resolution AG/RES. 1932 (XXXIII-O/03) of June 10, 2003, on "Access to Public Information: Strengthening Democracy"; Resolution AG/RES. (XXXIV-O/04) of June 8, 2004, on "Access to Public Information: Strengthening Democracy"; Resolution AG/RES. 2121 (XXXV-O/05) of June 7, 2005, on "Access to Public Information: Strengthening Democracy"; and AG/RES. 2252 (XXXVI-O/06) of June 6, 2006, on "Access to Public Information: Strengthening Democracy."

⁷⁶ Cf. Resolution AG/RES. 2252 (XXXVI-O/06) of June 6, 2006, on "Access to Public Information: Strengthening Democracy," second operative paragraph.

⁷⁷ Cf. Inter-American Democratic Charter adopted by the General Assembly of the OAS on September 11, 2001, during the twenty-eighth special session held in Lima, Peru.

press” as essential components of the exercise of democracy. Moreover, Article 6 of the Charter states that “[i]t is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy”; therefore, it invites the States Parties to “[p]romot[e] and foster[...] diverse forms of [citizen] participation.”

80. In the Nueva León Declaration, adopted in 2004, the Heads of State of the Americas undertook, among other matters, “to provid[e] the legal and regulatory framework and the structures and conditions required to guarantee the right of access to information to our citizens,” recognizing that “[a]ccess to information held by the State, subject to constitutional and legal norms, including those on privacy and confidentiality, is an indispensable condition for citizen participation [...].”⁷⁸

81. The provisions on access to information established in the United Nations Convention against Corruption⁷⁹ and in the Rio Declaration on Environment and Development should also be noted.⁸⁰ In addition, within the Council of Europe, as far back as 1970, the Parliamentary Assembly made recommendations to the Committee of Ministers of the Council of Europe on the “right of freedom of information,”⁸¹ and also issued a Declaration establishing that, together with respect for the right of freedom of expression, there should be “a corresponding duty for the public authorities to make available information on matters of public interest within reasonable limits [...].”⁸² In addition, recommendations and directives have been adopted⁸³ and, in 1982, the Committee of Ministers adopted a “Declaration on freedom of expression and information,” in which it expressed the goal of the pursuit of an open information policy in the public sector.⁸⁴ In 1998, the “Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters” was adopted during the Fourth Ministerial Conference “Environment for Europe,” held in Aarhus, Denmark. In addition, the Committee of Ministers of the Council of Europe issued

⁷⁸ Cf. Declaration of Nueva León, adopted on January 13, 2004, by the Heads of State and Government of the Americas, during the Special Summit of the Americas, held in Monterrey, Nuevo León, Mexico.

⁷⁹ Cf. Articles 10 and 13 of the United Nations Convention against Corruption, adopted by Resolution 58/4 of the General Assembly of the United Nations of October 31, 2003.

⁸⁰ Cf. Principle 10 of the Rio Declaration on Environment and Development adopted at the United Nations Conference on Environment and Development held from June 3 to 14, 1992.

⁸¹ Cf. Recommendation No. 582 adopted by the Council of Europe Parliamentary Assembly on January 23, 1970. It recommended instructing the Committee of Experts on Human Rights Experts to consider and make recommendations on:

(i) the extension of the right of freedom of information provided for in Article 10 of the European Convention on Human Rights, by the conclusion of a protocol or otherwise, so as to include freedom to seek information (which is included in Article 19(2) of the United Nations Covenant on Civil and Political Rights); there should be a corresponding duty on public authorities to make information available on matters of public interest, subject to appropriate limitations;

⁸² Cf. Resolution No. 428 adopted by the Council of Europe Parliamentary Assembly on January 23, 1970.

⁸³ Cf. Resolution No. 854 adopted by the Council of Europe Parliamentary Assembly on February 1, 1979, which recommended the Committee of Ministers “to invite member states which have not yet done so to introduce a system of freedom of information,” which included the right to seek and receive information from government agencies and departments; and Directive 2003/4/EC of the European Parliament and Council of January 28, 2003, on public access to environmental information.

⁸⁴ Declaration on the Freedom of Expression and Information adopted by the Committee of Ministers of April 29, 1982.

a recommendation on the right of access to official documents held by the public authorities,⁸⁵ and its principle IV establishes the possible exceptions, stating that “[these] restrictions should be set down precisely in law, be necessary in a democratic society and be proportionate to the aim of protecti[on].”

82. The Court also finds it particularly relevant that, at the global level, many countries have adopted laws designed to protect and regulate the right to accede to State-held information.

83. Finally, the Court finds it pertinent to note that, subsequent to the facts of this case, Chile has made significant progress with regard to establishing by law the right of access to State-held information, including a constitutional reform and a draft law on this right which is currently being processed.

*
* *

84. The Court has stated that “[r]epresentative democracy is the determining factor throughout the system of which the Convention is a part,” and “a ‘principle’ reaffirmed by the American States in the OAS Charter, the basic instrument of the inter-American system.”⁸⁶ In several resolutions, the OAS General Assembly has considered that access to public information is an essential requisite for the exercise of democracy, greater transparency and responsible public administration and that, in a representative and participative democratic system, the citizenry exercises its constitutional rights through a broad freedom of expression and free access to information.⁸⁷

85. The Inter-American Court referred to the close relationship between democracy and freedom of expression, when it established that:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a condition *sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.⁸⁸

86. In this regard, the State’s actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately. Access to State-held information of public interest can permit participation in public administration through the social control that can be exercised through such access.

⁸⁵ Cf. Recommendation No. R (2002)2, adopted on February 21, 2002.

⁸⁶ Cf. . *Case of YATAMA*. Judgment of June 23, 2005. Series C No. 127, para. 192; and *The Word “Laws” in Article 30 of the American Convention on Human Rights*. Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 34.

⁸⁷ Cf. *Supra* note 75.

⁸⁸ Cf. . *Case of Ricardo Canese*, *supra* note 72, para. 82; . *Case of Herrera Ulloa*, *supra* note 72, para. 112; and Advisory Opinion OC-5/85, *supra* note 72, para. 70.

87. Democratic control by society, through public opinion, fosters transparency in State activities and promotes the accountability of State officials in relation to their public activities.⁸⁹ Hence, for the individual to be able to exercise democratic control, the State must guarantee access to the information of public interest that it holds. By permitting the exercise of this democratic control, the State encourages greater participation by the individual in the interests of society.

B) The restrictions to the exercise of the right of access to State-held information imposed in this case

88. The right of access to State-held information admits restrictions. This Court has already ruled in other cases on the restrictions that may be imposed on the exercise of freedom of thought and expression.⁹⁰

89. In relation to the requirements with which a restriction in this regard should comply, first, they must have been established by law to ensure that they are not at the discretion of public authorities. Such laws should be enacted "for reasons of general interest and in accordance with the purpose for which such restrictions have been established." In this respect, the Court has emphasized that:

From that perspective, one cannot interpret the word "laws," used in Article 30, as a synonym for just any legal norm, since that would be tantamount to admitting that fundamental rights can be restricted at the sole discretion of governmental authorities with no other formal limitation than that such restrictions be set out in provisions of a general nature.

[...]

The requirement that the laws be enacted for reasons of general interest means they must have been adopted for the "general welfare" (Art. 32(2)), a concept that must be interpreted as an integral element of public order (*ordre public*) in democratic States [...].⁹¹

90. Second, the restriction established by law should respond to a purpose allowed by the American Convention. In this respect, Article 13(2) of the Convention permits imposing the restrictions necessary to ensure "respect for the rights or reputations of others" or "the protection of national security, public order, or public health or morals."

91. Lastly, the restrictions imposed must be necessary in a democratic society; consequently, they must be intended to satisfy a compelling public interest. If there are various options to achieve this objective, that which least restricts the right protected must be selected. In other words, the restriction must be proportionate to the interest that justifies it and must be appropriate for accomplishing this legitimate purpose, interfering as little as possible with the effective exercise of the right.⁹²

⁸⁹ Cf. . *Case of Palamara Iribarne*, *supra* note 72, para. 83; . *Case of Ricardo Canese*, *supra* note 72, para. 97; and . *Case of Herrera Ulloa*, *supra* note 72, para. 127. Likewise, cf. *Feldek v. Slovakia*, no. 29032/95, § 83, ECHR 2001-VIII; and *Surek and Ozdemir v. Turkey*, nos. 23927/94 and 24277/94, § 60, ECHR Judgment of 8 July, 1999.

⁹⁰ Cf. *Case of López Álvarez*, *supra* note 72, para. 165; . *Case of Palamara Iribarne*, *supra* note 72, para. 85; . *Case of Ricardo Canese*, *supra* note 72, para. 95; and . *Case of Herrera Ulloa*, *supra* note 72, paras. 120-123.

⁹¹ Cf. Advisory Opinion. OC-6/86, *supra* note 86, paras. 26-29.

⁹² Cf. *Case of Palamara Iribarne*, *supra* note 72, para. 85; . *Case of Ricardo Canese*, *supra* note 72, para. 96; . *Case of Herrera Ulloa*, *supra* note 72, paras. 121 and 123; and Advisory Opinion OC-5/85, *supra* note 72, para. 46.

92. The Court observes that in a democratic society, it is essential that the State authorities are governed by the principle of maximum disclosure, which establishes the presumption that all information is accessible, subject to a limited system of exceptions.

93. It corresponds to the State to show that it has complied with the above requirements when establishing restrictions to the access to the information it holds.

94. In the instant case, it has been proved that the restriction applied to the access to information was not based on a law. At the time, there was no legislation in Chile that regulated the issue of restrictions to access to State-held information.

95. Furthermore, the State did not prove that the restriction responded to a purpose allowed by the American Convention, or that it was necessary in a democratic society, because the authority responsible for responding to the request for information did not adopt a justified decision in writing, communicating the reasons for restricting access to this information in the specific case.

96. Even though, when restricting the right, the public authority from which information was requested did not adopt a decision justifying the refusal, the Court notes that, subsequently, during the international proceedings, the State offered several arguments to justify the failure to provide the information requested in sections 3, 6 and 7 of the request of May 7, 1998 (*supra* para. 57(13)).

97. Moreover, it was only during the public hearing held on April 3, 2006 (*supra* para. 32), that the Vice President of the Foreign Investment Committee at the time of the facts, who appeared as a witness before the Court, explained the reasons why he did not provide the requested information on the three sections (*supra* para. 57(20)). Essentially he stated that "the Foreign Investment Committee [...] did not provide the company's financial information because disclosing this information was against the collective interest," which was "the country's development," and that it was the Investment Committee's practice not to provide financial information on the company that could affect its competitiveness to third parties. He also stated that the Committee did not have some of the information, and that it was not obliged to have it or to acquire it.

98. As has been proved, the restriction applied in this case did not comply with the parameters of the Convention. In this regard, the Court understands that the establishment of restrictions to the right of access to State-held information by the practice of its authorities, without respecting the provisions of the Convention (*supra* paras. 77 and 88 to 93), creates fertile ground for discretionary and arbitrary conduct by the State in classifying information as secret, reserved or confidential, and gives rise to legal uncertainty concerning the exercise of this right and the State's powers to limit it.

99. It should also be stressed that when requesting information from the Foreign Investment Committee, Marcel Claude Reyes "proposed to assess the commercial, economic and social elements of the [Río Cándor] project, measure its impact on the environment [...] and set in motion social control of the conduct of the State bodies that intervene or intervened" in the development of the "Río Cándor exploitation" project (*supra* para. 57(13)). Also, Arturo Longton Guerrero stated that he went to request information "concerned about the possible indiscriminate felling of indigenous forests in the extreme south of Chile" and that "[t]he refusal of public information hindered [his] monitoring task" (*supra* para. 48). The possibility of Messrs. Claude Reyes and Longton Guerrero carrying out social control of public administration was harmed by not receiving

the requested information, or an answer justifying the restrictions to their right of access to State-held information.

*
* *

100. The Court appreciates the efforts made by Chile to adapt its laws to the American Convention concerning access to State-held information; in particular, the reform of the Constitution in 2005, which established that the confidentiality or secrecy of information must be established by law (*supra* para. 57(41), a provision that did not exist at the time of the facts of this case.

101. Nevertheless, the Court considers it necessary to reiterate that, in accordance with the obligation established in Article 2 of the Convention, the State must adopt the necessary measures to guarantee the rights protected by the Convention, which entails the elimination of norms and practices that result in the violation of such rights, as well as the enactment of laws and the development of practices leading to the effective respect for these guarantees. In particular, this means that laws and regulations governing restrictions to access to State-held information must comply with the Convention's parameters and restrictions may only be applied for the reasons allowed by the Convention (*supra* paras. 88 to 93); this also relates to the decisions on this issue adopted by domestic bodies.

102. It should be indicated that the violations in this case occurred before the State had made these reforms; consequently, the Court concludes that, in the instant case, the State did not comply with the obligations imposed by Article 2 of the American Convention to adopt the legislative or other measures necessary to give effect to the right to freedom of thought and expression of Marcel Claude Reyes and Arturo Longton Guerrero.

*
* *

103. Based on the above, the Court finds that the State violated the right to freedom of thought and expression embodied in Article 13 of the American Convention to the detriment of Marcel Claude Reyes and Arturo Longton Guerrero, and failed to comply with the general obligation to respect and ensure the rights and freedoms established in Article 1(1) thereof. In addition, by not having adopted the measures that were necessary and compatible with the Convention to make effective the right of access to State-held information, Chile failed to comply with the general obligation to adopt domestic legal provisions arising from Article 2 of the Convention.

VIII
ARTICLE 23 (RIGHT TO PARTICIPATE IN GOVERNMENT)
OF THE AMERICAN CONVENTION
IN RELATION TO ARTICLES 1(1) AND 2 THEREOF

104. The Commission did not allege that Article 23 of the Convention had been violated.

The arguments of the alleged victims' representative:

105. The representative alleged that Chile had violated Article 23 of the Convention, in relation to Articles 1(1) and 2 thereof, an opinion that does not appear in the application lodged by the Commission. The representative stated that:

(a) The State violated the right to participate directly in public affairs, because this is not legally recognized in Chile. To be effective, it is essential that citizens can also exercise the right to accede to public information, since these two rights "converge, legitimate and sustain the right of social control";

(b) "The unjustified refusal to provide the requested information regarding the name of the investor, his suitability and soundness, represents an evident violation of the right to participate in government, by hindering the alleged victims' participation in the public debate on a relevant aspect of foreign investment of public interest concerning the exploitation of the country's natural resources"; and

(c) The State violated the general obligations established in Articles 1 and 2 of the American Convention because it lacked practices and measures to promote the exercise of the general right to citizen participation and because it did not have specific legal recourses to protect this.

106. The State did not submit arguments on the alleged violation of Article 23 of the American Convention.

The Court's findings

107. The Court will not examine the alleged violation of Article 23 of the Convention because it has already taken into consideration the arguments made by the representative in this respect when examining the violation of Article 13 of the American Convention.

IX
VIOLATION OF ARTICLES 8 AND 25
(RIGHTS TO A FAIR TRIAL AND TO JUDICIAL PROTECTION) OF THE CONVENTION
IN RELATION TO ARTICLE 1(1) THEREOF

108. The Commission did not allege any violation of Article 8 of the Convention. However, regarding Article 25, in relation to Articles 1(1) and 2 thereof, it stated that:

(a) The absence of an effective judicial recourse to repair the violation of rights protected by the Convention constitutes a violation thereof. For the recourse to be effective, the judicial body must assess the merits of the complaint; and

(b) The State is obliged to provide an effective judicial recourse for alleged violations of the right of access to information. Chile did not grant this recourse to the alleged victims in this case, because "Chilean justice never attempted, even superficially, to determine the rights of the victims," "nor has it ensured an appropriate mechanism or procedure for an individual who requests information to have access to an independent and effective regulatory judicial body to ensure his right of access to information."

109. The alleged victims' representative submitted his arguments on the alleged violations of Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention together; therefore, this is how they are summarized below:

(a) The Santiago Court of Appeal did not hear the appellant's petition, and declared it inadmissible "without providing any type of reasoning on how it reached this conclusion"; that decision was ratified by the Supreme Court. This "declaration of the inadmissibility of the recourse prevented the victims from being heard with due guarantees in order to protect the alleged right;

(b) In his final arguments, he stated that the State had failed to comply with the provisions of Articles 1 and 2 of the Convention, since the formal procedure for processing the judicial recourse for the protection of fundamental rights established in Article 20 of the Chilean Constitution is not incorporated into the system by law as the Convention requires, but by a decision of the Supreme Court. The Judiciary's practice reveals a restrictive application of the criteria on the admissibility of this recourse. He requested the Court to declare that the decision taken by the Supreme Court of Justice regulating the said recourse "violates Articles 8 and 25 of the Convention".

110. The State did not refer to the alleged violation of Article 8 of the American Convention, but in relation to Article 25 indicated that:

(a) Article 25 of the Convention "imposes on the State an obligation concerning means rather than results." As of 1999, Chile has had a remedy of *habeas data* that offers the necessary guarantees to obtain access to public information." This recourse may be filed at any time; consequently, the alleged victims, could have filed it, if they were denied information; and

(b) The alleged victims, "including Deputy Arturo Longton," also had another domestic recourse that they could have filed before the Chamber of Deputies. They announced that they would file it, but never did so, despite its effectiveness. Using this recourse, any deputy "could, during the time devoted to motions, request specific reports or information from body of the State Administration through the Secretariat of the Chamber of Deputies."

The Court's findings

111. Regarding the alleged violation of Article 8 of the Convention, the Court reiterates its case law concerning the possibility of the alleged victims or their representatives invoking rights other than those included in the Commission's application.⁹³

112. The proven facts (*supra* para. 57(12) to 57(17) and 57(23) to 57(30)) have established that the Executive Vice President of the Foreign Investment Committee (in the administrative sphere) and the Santiago Court of Appeal (in the judicial sphere) adopted decisions on the request for access to State-held information by Mr. Claude Reyes and Mr. Longton Guerrero.

⁹³ Cf. *Case of Acevedo Jaramillo et al.*, Judgment of February 7, 2006. Series C No. 144, para. 280; *Case of López Álvarez*, *supra* note 72, para. 82; and *Case of the Pueblo Bello Massacre*, Judgment of January 31, 2006. Series C No. 140, para. 54.

113. The Court will first examine whether the administrative decision was adopted in accordance with the guarantee of due justification protected by Article 8(1) of the Convention. Then, the Court will determine whether the judicial decision complied with this guarantee and whether, in the instant case, Chile guaranteed the right to a simple and prompt recourse, or any other effective recourse, embodied in Article 25(1) of the Convention.

1) Application of Article 8(1) of the Convention in relation to the decision of the administrative body

114. Article 8(1) of the Convention establishes that:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

115. The Court will now consider whether, in the instant case, Chile complied with the guarantee of justifying the decision not to provide part of the requested information adopted by the Vice President of the Foreign Investment Committee.

116. Article 8 of the American Convention applies to all the requirements that must be observed by procedural instances, whatsoever their nature, to ensure that the individual may defend himself adequately with regard to any act of the State that may affect his rights.⁹⁴

117. According to the provisions of Article 8(1) of the Convention, when determining the rights and obligations of the individual of a criminal, civil, labor, fiscal or any other nature, "due guarantees" must be observed that ensure the right to due process in the corresponding procedure.⁹⁵ Failure to comply with one of these guarantee results in a violation of this provision of the Convention.

118. Article 8(1) of the Convention does not apply merely to judges and judicial courts. The guarantees established in this provision must be observed during the different procedures in which State entities adopt decisions that determine the rights of the individual, because the State also empowers administrative, collegiate, and uni-personal authorities to adopt decisions that determine rights.

119. Consequently, the guarantees established in Article 8(1) of the Convention are also applicable when a public authority adopts decisions that determine such rights,⁹⁶ bearing in mind that, although the guarantees inherent in a jurisdictional body are not required of him, he must comply with the guarantees designed to ensure that his decision is not arbitrary.

⁹⁴ Cf. *Case of YATAMA*, *supra* note 86, para. 147; *Ivcher Bronstein case*, *supra* note 72, para. 102; *Case of Baena Ricardo et al.*, Judgment of February 2, 2001. Series C No. 72, para. 124; and *the Case of Constitutional Court*, Judgment of January 31, 2001. Series C No. 71, para. 69.

⁹⁵ Cf. *Case of YATAMA*, *supra* note 86, paras. 148-164; and *Case of Baena Ricardo et al.*, *supra* note 94, paras. 127-134.

⁹⁶ Cf. *Case of YATAMA*, *supra* note 86, para. 149; *Case of Ivcher Bronstein*, *supra* note 72, para. 105; and *Case of Baena Ricardo et al.*, *supra* note 94, para. 124.

120. The Court has established that decisions adopted by domestic bodies that could affect human rights should be duly justified; otherwise, they would be arbitrary decisions.⁹⁷

121. It has been proved (*supra* para. 57(17)) that, in response to the request for State-held information made by Mr. Claude Reyes and Mr. Longton Guerrero, the Executive Vice President of the Foreign Investment Committee decided to refuse to provide part of the information. As this Court has found (*supra* paras. 88 to 103), the decision adopted by this official adversely affected the exercise of the right to freedom of thought and expression of Marcel Claude Reyes and Arturo Longton Guerrero.

122. In this case, the State's administrative authority responsible for taking a decision on the request for information did not adopt a duly justified written decision, which would have provided information regarding the reasons and norms on which he based his decision not to disclose part of the information in this specific case and established whether this restriction was compatible with the parameters embodied in the Convention. Hence, this decision was arbitrary and did not comply with the guarantee that it should be duly justified protected by Article 8(1) of the Convention.

123. In view of the above, the Court concludes that the said decision of the administrative authority violated the right to judicial guarantees embodied in Article 8(1) of the Convention, in relation to Article 1(1) thereof, to the detriment of Marcel Claude Reyes and Arturo Longton Guerrero.

2) Application of Article 8(1) of the Convention in relation to the decision of the Santiago Court of Appeal and the right to a simple and prompt recourse, or any other effective recourse, established in Article 25(1) of the Convention

124. Article 25(1) of the Convention stipulates that:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

125. Article 2 establishes that:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

126. The Court has established that all State bodies which exercise functions of a substantially jurisdictional nature have the obligation to adopt just decisions based on full respect for the guarantee of due process established in Article 8 of the American Convention.⁹⁸

⁹⁷ Cf. *Case of Palamara Iribarne case*, *supra* note 72, para. 216; and *Case of YATAMA case*, *supra* note 86, para. 152. Also, cf. *García Ruiz v. Spain [GC]*, no. 30544/96, § 26, ECHR 1999-I; and *Eur. Court H.R., Case of H. v. Belgium*, Judgment of 30 November 1987, Series A no. 127-B, para. 53.

⁹⁸ Cf. *Case of Palamara Iribarne*, *supra* note 72, para. 164; *Case of YATAMA*, *supra* note 86, para. 149; and *Case of Ivcher Bronstein*, *supra* note 72, para. 104.

127. The Court has affirmed that the effective recourse mentioned in Article 25 of the Convention must be processed in accordance with the rules of due process established in Article 8(1) thereof, in keeping with the general obligation of the States to guarantee the free and full exercise of the rights established in the Convention to all persons subject to their jurisdiction (Article 1(1)).⁹⁹ To this end, the application for protection of rights filed before the Santiago Court of Appeal should have been processed respecting the guarantees embodied in Article 8(1) of the Convention.

128. Article 25(1) of the Convention has established the broad scope of the State's obligation to offer to all persons subject to their jurisdiction an effective judicial recourse to contest acts that violate their fundamental rights. It also establishes that the guarantee embodied therein applies not only with regard to the rights contained in the Convention, but also those recognized by the Constitution and by law.¹⁰⁰

129. Safeguarding the individual from the arbitrary exercise of public authority is the main purpose of the international protection of human rights.¹⁰¹ The inexistence of effective domestic recourses places the individual in a state of defenselessness.¹⁰²

130. The inexistence of an effective recourse against violations of the rights established in the Convention constitutes a violation thereof by the State Party.¹⁰³ States Parties to the Convention are obliged to establish the said effective recourse by law and ensure its due implementation.

131. For the State to comply with the provisions of Article 25 of the Convention, it is not enough that recourses exist formally; they must be effective¹⁰⁴ in the terms of that article. The existence of this guarantee "constitutes one of the basic pillars not only of the American Convention on Human Rights, but also of the rule of law itself in a democratic society, according to the Convention."¹⁰⁵ The Court has stated repeatedly that this

⁹⁹ Cf. *Case of Ximenes Lopes*, *supra* note 2, para. 193; *Case of Palamara Iribarne*, *supra* note 72, para. 163; and *Case of the Moiwana Community case*. Judgment of June 15, 2005. Series C No. 124, para. 142.

¹⁰⁰ Cf. *Case of YATAMA*, *supra* note 86, para. 167; *Case of Cantos*. Judgment of November 28, 2002. Series C No. 97, para. 52; *Case of the Mayagna (Sumo) Awas Tingni Community*. Judgment of August 31, 2001. Series C No. 79, para. 111; and *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 23.

¹⁰¹ Cf. *Case of Acevedo Jaramillo et al.*, *supra* note 93, para. 213; *Case of García Asto and Ramírez Rojas*. Judgment of November 25, 2005. Series C No. 137, para. 113; and *Case of Palamara Iribarne*, *supra* note 72, para. 183.

¹⁰² Cf. *Case of García Asto and Ramírez Rojas*, *supra* note 101, para. 113; *Case of Palamara Iribarne*, *supra* note 72, para. 183; *Case of Acosta Calderón*. Judgment of June 24, 2005. Series C No. 129, para. 92; and Advisory Opinion OC-9/87, *supra* note 100, para. 23.

¹⁰³ Cf. *Case of YATAMA*, *supra* note 86, para. 168; *Case of the Yakyé Axa Indigenous Community*. Judgment of June 17, 2005. Series C No. 125, para. 61; and *Case of "Five Pensioners"*. Judgment of February 28, 2003. Series C No. 98, para. 136.

¹⁰⁴ Cf. *Case of Ximenes Lopes*, *supra* note 2, para. 192; *Baldeón García case*, *supra* note 2, para. 144; and *Case of Acevedo Jaramillo et al.*, *supra* note 93, para. 213.

¹⁰⁵ Cf. *Case of Ximenes Lopes*, *supra* note 2, para. 192; *Case of Baldeón García*, *supra* note 2, para. 144; and *Case of López Álvarez*, *supra* note 72, para. 138.

obligation implies that the recourse must be appropriate to contest the violation, and that its implementation by the competent authority must be effective.¹⁰⁶

132. In this case, Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola filed an application for protection before the Santiago Court of Appeal on July 27, 1998 (*supra* para. 57(23)), based, *inter alia*, on the fact that “the omissive conduct of the Foreign Investment Committee” affected the constitutional guarantee contained in Article 19(12) (“freedom to issue an opinion and impart information”) of the Constitution, “in relation to Article 5(2) thereof¹⁰⁷ and Articles 13(1) of the American Convention on Human Rights and 19(2) of the International Covenant on Civil and Political Rights, because it constituted an arbitrary omission concerning access to public information, which was not permitted by law and which prevented the appellants [...] from exercising social control of the body of the State Administration.”

133. The said application for protection is established in Article 20 of the Constitution, and it can be filed by an individual “on his own behalf, or by another person on his behalf” before the respective court of appeal, when “owing to arbitrary or illegal acts or omissions, he suffers denial of, interference with or threat to the legitimate exercise of the rights and guarantees established in specific subparagraphs of Article 19 of the Constitution (*supra* para. 57(24)).

134. When deciding this recourse, the Santiago Court of Appeal failed to decide on the dispute resulting from the action of the Vice President of the Foreign Investment Committee by ruling on the existence of the right of access to the requested information in this specific case, since the judicial decision was to declare that the filed application for protection was inadmissible (*supra* para. 57(25)).

135. First, the Court finds that this judicial decision lacked sufficient justification. The Santiago Court of Appeal merely indicated that it had adopted the decision on the basis that, “from the facts described [...] and from the background information attached to the application, it is clearly without grounds.” The Court of Appeal also indicated that it considered that “the purpose of the application for protection is to re-establish the rule of law when this has been disrupted by arbitrary or illegal acts or omissions that threaten, interfere with or deny the legitimate exercise of one of the guarantees specifically included in Article 20 of the Constitution, without prejudice to other legal actions,” without developing any other conclusions in this regard.

136. The said judicial decision does not contain any justification other than the one indicated above. The Santiago Court of Appeal did not make even the least reference to the reasons why it was “evident” from the “facts” and “background information” in the application that it was “clearly without grounds.” Moreover, it did not assess whether the action of the administrative authority, by not providing part of the requested information, related to any of the guarantees that can be the object of the application for protection, or whether any other recourse before the regular courts would be admissible.

¹⁰⁶ Cf. *Case of López Álvarez*, *supra* note 72, para. 139; *Case of Palamara Iribarne*, *supra* note 72, para. 184; and *Case of Acosta Calderón*, *supra* note 102, para. 93.

¹⁰⁷ Which establishes that “the exercise of sovereignty recognizes as a limitation respect for the fundamental human rights. It is the obligation of the State to respect and promote these rights, guaranteed by this Constitution and also by the international treaties ratified by Chile and which are in force.”

137. When State-held information is refused, the State must guarantee that there is a simple, prompt and effective recourse that permits determining whether there has been a violation of the right of the person requesting information and, if applicable, that the corresponding body is ordered to disclose the information. In this context, the recourse must be simple and prompt, bearing in mind that, in this regard, promptness in the disclosure of the information is essential. According to the provisions of Articles 2 and 25(2)(b) of the Convention, if the State Party to the Convention does not have a judicial recourse to protect the right effectively, it must establish one.

138. Regarding the alleged violation of Article 25 of the Convention, Chile merely indicated that "the petitioners filed the application for protection of constitutional guarantees without obtaining results that satisfied their claims," and explained the reforms carried out as of November 1999 which, *inter alia*, established a "specific [judicial] recourse concerning access to information."

139. The Court considers that, in the instant case, Chile failed to guarantee an effective judicial recourse that was decided in accordance with Article 8(1) of the Convention and which resulted in a ruling on the merits of the dispute concerning the request for State-held information; in other words, a ruling on whether the Foreign Investment Committee should have provided access to the requested information.

140. The Court appreciates the efforts made by Chile in 1999 when it established a special judicial recourse to protect access to public information. Nevertheless, it should be pointed out that the violations in this case occurred before the State made this progress in its legislation, so that the State's argument that the alleged victims in this case "could have filed it" is inappropriate since, at the time of the facts of this case, the said recourse had not been established.

141. The Court considers that the three persons who filed the judicial recourse before the Santiago Court of Appeal are victims. They are Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola because, although the Court has determined that the right of freedom of thought and expression has been violated only in the case of Marcel Claude Reyes and Arturo Longton Guerrero (*supra* paras. 69 to 71 and 103), the Chilean judicial body should have issued a ruling if the recourse was inadmissible in the case of one of the appellants owing to active legal standing.

142. Based on the above, the Court concludes that the State violated the right to judicial protection embodied in Article 25(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola, by failing to guarantee them a simple, prompt and effective recourse that would protect them from actions of the State that they alleged violated their right of access to State-held information.

143. The Court also concludes that the said decision of the Santiago Court of Appeal declaring the application for protection inadmissible did not comply with the guarantee that it should be duly justified. Accordingly, the State violated the right to judicial guarantees embodied in Article 8(1) of the Convention, in relation to Article 1(1) thereof, to the detriment of Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola.

144. The alleged violation of Articles 8 and 25 of the Convention regarding the regulation of the formal procedure of processing the judicial recourse for the protection of fundamental rights (*supra* para. 109(b)), was not alleged by the representative at the

due procedural opportunity. However, the Court considers it necessary to recall that the regulation of the processing of the recourse referred to in Article 25 of the Convention must be compatible with this treaty.

X

REPARATIONS

APPLICATION OF ARTICLE 63(1) OF THE CONVENTION

Obligation to Repair

The Commission's arguments

145. The Commission requested the Court to order that the State should:

(a) Grant "adequate reparation to Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero for the violations of their rights, and also provide them with the requested information." Even though the State argued that all these sections were invalid now, because the Río Cóndor Project was never implemented, this information "was relevant to assess the functioning of the Foreign Investment Committee, and not merely one specific project." "It was for the [alleged] victims and not the State to decide whether the information was still of interest to them";

(b) Regarding the measures of satisfaction and guarantees of non-repetition: "acknowledge that it erroneously retained the information requested by the victims and immediately grant [them] access to the information they were seeking from the Foreign Investment Committee"; and that it "adopt laws and practices that guarantee effective access to information held by State bodies, in keeping with the terms of Article 13 of the Convention," because "the Commission considers that the Chilean legislation in force is insufficient to guarantee access to State-held information"; and

(c) Regarding costs and expenses: pay the costs arising at the domestic level when processing the legal actions filed by the victims under the domestic judicial system, as well as those arising at the international level when processing the case before the Commission and the Court.

The representative's arguments

146. The representative requested the Court to order that the State should:

(a) "Adapt domestic legislation, establish autonomous and independent supervision and control mechanisms, and adopt the necessary measures to develop practices that guarantee the individual's real access to public information [and direct participation in the administration of public affairs], including providing information on matters relating to the well-being of society, such as the protection of human rights, the environment, health, and public security";

(b) "Arrange for the disclosure of the information held by the Investment Committee concerning the investor, Forestal Trillium Ltda";

(c) "Apologize publicly to the victims, through the Foreign Investment Committee, as a measure of non-pecuniary reparation";

d) "Publish a copy of all the operative paragraphs of the judgment in the national media, and disseminate its content and the public apology";

(e) In his final arguments, he requested that Chile should be ordered "to adopt legislative measures to provide a legal framework for the procedure of processing the application for protection embodied in Article 20 of the Constitution"; and

(f) Regarding costs and expenses, he requested that Chile should be ordered to reimburse the expenses and costs that the proceedings under domestic law and within the inter-American system have signified for the victims and their representatives. He requested US\$50,000.00 (fifty thousand United States dollars) for professional honoraria before the domestic courts and before the inter-American system; US\$4,000.00 (four thousand United States dollars) for "operating and administrative expenses, and US\$6,000.00 (six thousand United States dollars) for the "presence of the victims' representatives before the Commission and the Court.

The State's arguments

147. Regarding reparations, Chile indicated that:

(a) "The claims in the [Commission's] application lack any purpose, because the information requested has already been provided and the guarantees requested are in the new Chilean legislation on the right to information." "Should the State's international responsibility for the alleged violations be confirmed, there has been no damage that justifies reparation"; and

(b) "Based on the fact that in its Report on Merits the Commission concluded that the State had violated the rights established in Articles 13 and 25 of the American Convention, it had informed [the Commission] that it was considering [...] a reparation of a symbolic nature that would encompass the situation of the rights violations of which Messrs. Claude, Cox and Longton were victims, and also publicize the progress made by Chile in the area of access to information."

The Court's findings

148. In view of the facts described in the preceding chapters, the Court has decided that the State is responsible for the violation of Article 13 of the American Convention in relation to Articles 1(1) and 2 thereof, to the detriment of Marcel Claude Reyes and Arturo Longton Guerrero, and of Articles 8(1) and 25 of the Convention, in relation to Article 1(1) thereof, to the detriment of Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola.

149. In its case law, the Court has established that it is a principle of international law that any violation of an international obligation that has produced damage entails the obligation to repair it adequately.¹⁰⁸ In this regard, the Court has based itself on Article 63(1) of the American Convention, according to which:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or

¹⁰⁸ Cf. *Case of Baldeón García*, *supra* note 2, para. 174; *Case of Acevedo Jaramillo et al.*, *supra* note 93, para. 294; and *Case of López Álvarez*, *supra* note 72, para. 179.

freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

Consequently, the Court will now consider the measures necessary to repair the damage caused to Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola, owing to these violations of the Convention.

150. Article 63(1) of the American Convention reflects a customary norm that constitutes one of the basic principles of contemporary international law on State responsibility. Thus, when an unlawful act occurs, which can be attributed to a State, this gives rise immediately to its international responsibility, with the consequent obligation to cause the consequences of the violation to cease and to repair the damage caused.¹⁰⁹

151. Whenever possible, reparation of the damage caused by the violation of an international obligation requires full restitution (*restitutio in integrum*), which consists in the re-establishment of the previous situation. If this is not possible, the international Court must determine measures to guarantee the violated rights, and repair the consequences of the violations.¹¹⁰ It is necessary to add the measures of a positive nature that the State must adopt to ensure that harmful facts such as those that occurred in the instant case are not repeated.¹¹¹ The responsible State may not invoke provisions of domestic law to modify or fail to comply with its obligation to provide reparation, all aspects of which (scope, nature, methods and determination of the beneficiaries) are regulated by international law.¹¹²

152. Reparations, as the word indicates, consist of measures tending to eliminate the effects of the violations that have been committed. Thus, the reparations established should be proportionate to the violations declared in the preceding chapters of this judgment.¹¹³

153. In accordance with the probative elements gathered during the proceedings, and in light of the above criteria, the Court will examine the claims submitted by the Commission and the representative regarding reparations, costs and expenses in order to determine the beneficiaries of the reparations and then order the pertinent measures of reparation and costs and expenses.

A) BENEFICIARIES

154. The Court has determined that the facts of the instant case constituted a violation of Article 13 of the American Convention in relation to Articles 1(1) and 2 thereof, to the

¹⁰⁹ Cf. *Case of Montero Aranguren et al. (Detention Center of Catia)*. Judgment of July 5, 2006. Series C No. 150, para. 116; *Case of Ximenes Lopes*, *supra* note 2, para. 208; and *Case of the Ituango Massacres*, *supra* note 2, para. 346.

¹¹⁰ Cf. *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 109, para. 117; *Case of Ximenes Lopes*, *supra* note 2, para. 209; and *Case of The Ituango Massacres*, *supra* note 2, para. 347.

¹¹¹ Cf. *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 109, para. 117; *Case of Baldeón García*, *supra* note 2, para. 176; and *Case of López Álvarez*, *supra* note 72, para. 182.

¹¹² Cf. *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 109, para. 117; *Case of Ximenes Lopes*, *supra* note 2, para. 209; and *Case of the Ituango Massacres*, *supra* note 2, para. 347.

¹¹³ Cf. *Case of Baldeón García*, *supra* note 2, para. 177; *Case of Acevedo Jaramillo et al.*, *supra* note 93, para. 297; and *Case of López Álvarez*, *supra* note 72, para. 181.

detriment of Marcel Claude Reyes and Arturo Longton Guerrero, and of Articles 8(1) and 25 of the Convention, in relation to Article 1(1) thereof, to the detriment of Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola who, as victims of the said violations, are eligible for the reparations established by the Court.

B) PECUNIARY DAMAGE

155. In the instant case, the victims' representative did not make any statement or request regarding possible pecuniary damage, and the Court has confirmed that the violations declared and the evidence provided did not result in damage of this type that would require reparations to be ordered.

C) NON-PECUNIARY DAMAGE

156. The Court considers that this judgment constitutes, *per se*, a significant and important form of reparation and moral satisfaction for the victims.¹¹⁴ However, in order to repair the non-pecuniary damage in this case, the Court will determine those measures of satisfaction and guarantees of non-repetition that are not of a pecuniary nature, but have public repercussions.¹¹⁵

Measures of satisfaction and guarantees of non-repetition

C.1) Request for State-held information

157. Regarding the argument that Chile submitted to the Court, according to which there is no longer any interest in providing the information, since the "Río Cóndor" Project was not implemented, it should be indicated that the social control sought through access to State-held information and the nature of the information requested are sufficient motives for responding to the request for information, without requiring the applicant to prove a specific interest or a direct involvement.

158. Therefore, since in this case the State has not provided part of the requested information and has not issued a justified decision regarding the request for information, the Court considers that the State, through the corresponding entity, should provide the information requested by the victims, if appropriate, or adopt a justified decision in this regard.

159. If the State considers that it was not the Foreign Investment Committee's responsibility to obtain part of the information requested by the victims in this case, it should provide a justified explanation of why it did not provide the information.

C.2) Publication of the pertinent parts of this judgment

160. As ordered in other cases as a measure of satisfaction,¹¹⁶ the State must publish once in the official gazette and in another newspaper with extensive national circulation,

¹¹⁴ Cf. *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 109, para. 131; *Case of the Ituango Massacres*, *supra* note 2, para. 387; and *Case of Baldeón García*, *supra* note 2, para. 189.

¹¹⁵ Cf. *Case of Palamara Iribarne*, *supra* note 72, para. 249; *Case of the Girls Yean and Bosico*. Judgment of September 8, 2005. Series C No. 130, para. 229; and *Case of Ricardo Canese*, *supra* note 72, para. 208.

¹¹⁶ Cf. *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 109, para. 151; *Case of Ximenes Lopes*, *supra* note 2, para. 249; and *Case of Baldeón García*, *supra* note 2, para. 194.

the chapter on the Proven Facts of this judgment, paragraphs 69 to 71, 73, 74, 77, 88 to 103, 117 to 123, 132 to 137 and 139 to 143 of this judgment, which correspond to Chapters VII and VIII on the violations declared by the Court, without the corresponding footnotes, and the operative paragraphs hereof. This publication should be made within six months of notification of this judgment.

C.3) Adoption of the necessary measures to guarantee the right of access to State-held information

161. The Court also considers it important to remind the State that, in keeping with the provisions of Article 2 of the Convention, if the exercise of the rights and freedoms protected by this treaty is not guaranteed, it has the obligation to adopt the legislative and other measures necessary to make these rights and freedoms effective.

162. The Court appreciates the significant normative progress that Chile has made concerning access to State-held information, that a draft law on access to public information is being processed, and that efforts are being made to create a special judicial recourse to protect access to public information (*supra* para. 57(35)).

163. Nevertheless, the Court finds it necessary to reiterate that the general obligation contained in Article 2 of the Convention involves the elimination of norms and practices of any type that result in violations of the guarantees established in the Convention, as well as the enactment of laws and the development of practices conducive to the effective observance of these guarantees (*supra* para. 64). Hence, Chile must adopt the necessary measures to guarantee the protection of the right of access to State-held information, and these should include a guarantee of the effectiveness of an appropriate administrative procedure for processing and deciding requests for information, which establishes time limits for taking a decision and providing information, and which is administered by duly trained officials.

C.4) Training for public entities, authorities and agents on access to State-held information

164. In this case, the administrative authority responsible for deciding the request for information of Messrs. Claude Reyes and Longton Guerrero adopted a position that violated the right of access to State-held information. In this regard, the Court observes with concern that several probative elements contributed to the case file reveal that public officials do not respond effectively to requests for information.

165. The Court considers that, within a reasonable time, the State should provide training to public entities, authorities and agents responsible for responding to requests for access to State-held information on the laws and regulations governing this right; this should incorporate the parameters established in the Convention concerning restrictions to access to this information that must be respected (*supra* paras. 77 and 88 to 101).

D) COSTS AND EXPENSES

166. As the Court has indicated previously, costs and expenses are included in the concept of reparations embodied in Article 63(1) of the American Convention, because the activity deployed by the victim in order to obtain justice at both the national and the international levels entails expenditure that must be compensated when the State's international responsibility is declared in a judgment against it. Regarding their

reimbursement, the Court must prudently assess their scope, which includes the expenses incurred before the authorities of the domestic jurisdiction, and also those resulting from the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be based on the principle of equity and taking into account the expenses indicated by the Inter-American Commission and by the representatives, provided the *quantum* is reasonable.¹¹⁷

167. The Court takes into consideration that the victims incurred expenses in the course of the measures taken in the domestic judicial sphere, and were represented by a lawyer in this sphere and before the Commission and the Court during the international proceedings. Since there is no documentary evidence to authenticate the expenses incurred in the international proceedings or in the domestic sphere, based on the equity principle, the Court establishes the sum of US\$10,000.00 (ten thousand United States dollars) or the equivalent in Chilean currency, which must be delivered in equal parts to Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola for costs and expenses, within one year. They will deliver the corresponding amount to their legal representative, in keeping with the assistance he has provided to them.

E) METHOD OF COMPLIANCE

168. The State must comply with the measures of reparation established in paragraphs 158, 159 and 160 of this judgment within six months; and the measures established in paragraphs 163 and 165 within a reasonable time. These time limits are calculated as of notification of this judgment.

169. The State must pay the amount established for reimbursement of costs and expenses as established in paragraph 167 of this judgment.

170. The State must comply with its pecuniary obligations by payment in United States dollars or the equivalent amount in Chilean currency, using the exchange rate between the two currencies in force on the New York, United States of America, market the day prior to payment to make the respective calculation.

171. The amount allocated in this judgment for reimbursement of costs and expenses may not be affected, reduced or conditioned by current or future taxes or charges. Consequently, it must be delivered to the victims integrally, as established in this judgment.

172. If the State falls into arrears, it shall pay interest on the amount owed, corresponding to banking interest on arrears in Chile.

173. In accordance with its consistent practice, the Court will exercise the authority inherent in its attributes to monitor compliance with all the terms of this judgment. The case will be closed when the State has fully complied with all its terms. Within one year of notification of the judgment, Chile shall provide the Court with a report on the measures adopted to comply with it.

¹¹⁷ Cf. *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 109, para. 152; *Case of the Ituango Massacres*, *supra* note 2, para. 414; and *Case of Baldeón García*, *supra* note 2, para. 208.

XI
OPERATIVE PARAGRAPHS

174. Therefore,

THE COURT

DECLARES,

Unanimously, that:

1. The State violated the right to freedom of thought and expression embodied in Article 13 of the American Convention on Human Rights, to the detriment of Marcel Claude Reyes and Arturo Longton Guerrero, in relation to the general obligations to respect and guarantee the rights and freedoms and to adopt provisions of domestic law established in Articles 1(1) and 2 thereof, in the terms of paragraphs 61 to 103 of this judgment.

By four votes to two, that:

2. The State violated the right to judicial guarantees embodied in Article 8(1) of the American Convention on Human Rights, to the detriment of Marcel Claude Reyes and Arturo Longton Guerrero, with regard to the administrative authority's decision not to provide information, in relation to the general obligation to respect and guarantee the rights and freedoms established in Article 1(1) thereof, in the terms of paragraphs 114 to 123 of this judgment.

Dissenting Judge Abreu Burelli and Judge Medina Quiroga.

Unanimously, that:

3. The State violated the rights to judicial guarantees and judicial protection embodied in Articles 8(1) and 25 of the American Convention on Human Rights, to the detriment of Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola, with regard to the judicial decision concerning the application for protection, in relation to the general obligation to respect and guarantee the rights and freedoms established in Article 1(1) thereof, in the terms of paragraphs 124 to 144 of this judgment.

Unanimously, that:

4. This judgment constitutes, *per se*, a form of reparation in the terms of paragraph 156 hereof.

AND DECIDES,

Unanimously, that:

5. The State shall, through the corresponding entity and within six months, provide the information requested by the victims, if appropriate, or adopt a justified decision in this regard, in the terms of paragraphs 157 to 159 and 168 of this judgment.

6. The State shall publish, within a period of six months, once in the official gazette and in another newspaper with extensive national circulation, the chapter on the Proven Facts of this judgment, paragraphs 69 to 71, 73, 74, 77, 88 to 103, 117 to 123, 132 to 137 and 139 to 143 of this judgment, which correspond to Chapters VII and VIII on the violations declared by the Court, without the corresponding footnotes, and the operative paragraphs hereof, in the terms of paragraphs 160 and 168 of this judgment.

7. The State shall adopt, within a reasonable time, the necessary measures to ensure the right of access to State-held information, pursuant to the general obligation to adopt provisions of domestic law established in Article 2 of the American Convention on Human Rights, in the terms of paragraphs 161 to 163 and 168 of this judgment.

8. The State shall, within a reasonable time, provide training to public entities, authorities and agents responsible for responding to requests for access to State-held information on the laws and regulations governing this right; this training should incorporate the parameters established in the Convention concerning restrictions to access to this information, in the terms of paragraphs 164, 165 and 168 of this judgment.

9. The State shall pay Marcel Claude Reyes, Arturo Longton Guerrero and Sebastián Cox Urrejola, within one year, for costs and expenses, the amount established in paragraph 167 of this judgment, in the terms of paragraphs 167 and 169 to 172.

10. It will monitor full compliance with this judgment and will consider the case closed when the State has fully executed its operative paragraphs. Within a year of notification of this judgment, the State shall send the Court a report on the measures adopted to comply with it, in the terms of paragraph 173 of this judgment.

Judge Abreu Burelli and Judge Medina Quiroga informed the Court of their joint dissenting opinion concerning the second operative paragraph. Judge García Ramírez informed the Court of his separate concurring opinion on the second operative paragraph. These opinions accompany this judgment.

Done in San José, Costa Rica, on September 19, 2006, in Spanish and English, the Spanish text being authentic.

Sergio García Ramírez
President

Alirio Abreu Burelli

Antônio A. Cançado Trindade

Cecilia Medina Quiroga

Manuel E. Ventura Robles

Diego García-Sayán

Pablo Saavedra Alessandri
Secretary

So ordered,

Sergio García Ramírez
President

Pablo Saavedra Alessandri
Secretary

**DISSENTING OPINION OF JUDGES
ALIRIO ABREU BURELLI AND CECILIA MEDINA QUIROGA**

1. We regret to dissent from the Court's decision to apply Article 8(1) to the decision of the Vice President of the Foreign Investment Committee to refuse information to the victims in this case (see paragraphs 115 to 123 of the judgment). Article 8(1) establishes every person's right to be heard "with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal [...] for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature." This provision seeks to protect the right of the individual to have disputes arising between two parties, whether private individuals or State bodies and whether or not they refer to human rights issues, decided with the most complete judicial guarantees. This provision is the guarantee, *par excellence*, of all human rights and a requirement *sine qua non* for the existence of a State in which the rule of law prevails. We consider that its importance should not be trivialized by applying it to situations that, in our opinion, cannot be the focus of this regulation.

2. A basic presumption for the application of this right is that the State has failed to respect a right or that the State has not provided a remedy should an individual fail to respect a right. When a right has been denied, the Convention establishes (under Article 8) the human right that a body with the characteristics indicated in this article will decide the dispute; in other words, the right to **proceedings** being initiated, where the parties who disagree may, *inter alia*, submit their respective arguments, present evidence, and contest each other.

3. The case examined in this judgment is clearly not a proceeding. A request for access to information and the refusal to grant it is not a juridical situation in which a legally-empowered State body **determines** the application of the right in a specific situation in which the norm embodying the right has been contested or violated. To the contrary, the act of refusing access to information **creates** the dispute and this gives rise to the right of those affected to resort to a body that will decide it, that will settle the dispute, based on its jurisdiction and competence. Under the State's legal system, this body is the respective court of appeal, by means of the proceeding initiated with the filing of an application for protection. Transforming the sequence "request-refusal" into a proceeding, requiring the application of Article 8 to process the request, would imply claiming that the request must be received and decided by an independent and impartial body and with all the guarantees that this provision establishes (*inter alia*, respect for the principles of equality and the adversary procedure), since Article 8(1) must be applied integrally and any element of it that is violated constitutes a violation thereof. This would have consequences that are not perhaps the most favorable for the petitioner in terms of difficulties and time limits. It would mean, in turn, requiring two jurisdictional proceedings in non-criminal cases, one to regulate the request for information and the other to review its refusal, and this is not a State obligation under the Convention.

4. The fact that Article 8(1) is applicable to proceedings that **determine** (rather than affect) rights or obligations and that they are opened when an act of the State has **affected** a right has been clearly established by the Court in the precedents cited in the judgment. In the Case of Constitutional Court, which examined the application by the Legislature of a sanction dismissing the three victims (para. 67), considerations, paragraph 69, starts by maintaining that although Article 8 of the American Convention is entitled "Right to a Fair Trial" [Note: "Judicial Guarantees" in the Spanish version], its

application is not strictly limited to judicial remedies, “but rather the **procedural requirements** that must be observed to be able to speak of effective and appropriate judicial guarantees so that a person **may defend himself adequately when any type of act of the State affects** his rights.” It adds that the State’s exercise of its power to sanction “not only presumes that the authorities act with total respect for the legal system, but also involves granting **the minimum guarantees of due process** to all persons who are subject to its jurisdiction, as established in the Convention” (para. 68). In paragraph 71, the Court emphasized that “although the jurisdictional function belongs, in particular, to the Judiciary [...], other public body or authorities may exercise functions of the same type,” and added that, consequently, the expression “competent judge or court” required to “determine” rights referred “to any public authority, whether administrative, legislative or judicial, which, through its decisions determines individual rights and obligations.” The Court concluded this reasoning by stating that “any State body that exercises **functions of a substantially jurisdictional nature** has the obligation to adopt decisions that are in consonance with the guarantees of due legal process in the terms of Article 8 of the American Convention.”

This means that Article 8 is applied when a State body is exercising jurisdictional powers, and it does not appear possible to argue this with regard to an official’s refusal to provide information to a private individual. In keeping with its position, in the Constitutional Court case, the Court proceeded to examine whether the dismissal of the justices, alleged victims in the case, complied with each and every requirement of this article, such as the impartiality, independence and competence of the State body and the right to defense of those affected (considerations, paragraphs 74, 77 and 81 to 84).

5. In the Case of Baena Ricardo *et al.*, the Court stated the same position, because the case was of a similar nature, since it also dealt with the State’s exercise of its powers to sanction (see considerations, paragraphs 124 and 131). In the Case of Ivcher-Bronstein, considerations, paragraph 105, repeats paragraph 171 of the Constitutional Court judgment and establishes as grounds for the violation of Article 8 the impediments that had been placed on the victim to defend himself, such as not informing him that his file had been lost, not allowing him to reconstruct it, not advising him of the charges of which he was accused, or allowing him to present witnesses (considerations, paragraph 106). In the Case of Yatama, the Court repeated its position that Article 8 applied to “procedural bodies” (paragraph 147); it stated that, in this case, the Supreme Electoral Council exercised jurisdictional functions, not only owing to the actions that it executed in this case, but because Nicaraguan legislation described these functions as jurisdictional in nature (paragraph 151).

6. None of the above corresponds to the case we are examining. The act that affected the right of Mr. Claude Reyes *et al.* was an official’s refusal to allow a private individual access to information; the proceedings used to contest this refusal was the application for protection and this is why we have concurred with the Court in finding a violation of Article 25, because the Chilean appellate court did not comply with the basic tenet for any judicial decision, that it should be justified.

7. However, this conclusion does not imply leaving the right to request access to information to the discretion of the State. The right to petition authorities, established in general in the laws of the countries of the region and certainly in Chile (Article 19(14) of the Chilean Constitution) requires a response from the State, which should be, in the

words of the Constitutional Court of Colombia, "clear, prompt and substantial."¹¹⁸ The right of petition would be meaningless and useless, if this was not required of the State. The lack of this response to Mr. Claude Reyes *et al.* has constituted, in our opinion, a violation of the constitutional right of petition and, since this petition was to accede to information, recognized in the American Convention as part of the right to freedom of expression, it has violated that right.

Alirio Abreu Burelli
Judge

Cecilia Medina Quiroga
Judge

Pablo Saavedra Alessandri
Secretary

¹¹⁸ Judgment T-281 of 1998. Reporting Judge Dr. Alejandro Martínez Caballero, Colombian Constitutional Court. Reproduced in www.ramajudicial.gov.co, <http://200.21.19.133/Judgments/programas/relatoria>.

**SEPARATE OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ
REGARDING THE JUDGMENT DELIVERED BY THE
INTER-AMERICAN COURT OF HUMAN RIGHTS
IN *CLAUDE REYES ET AL. V. CHILE*
OF SEPTEMBER 19, 2006**

1. Over the past twenty-five years, the case law of the Inter-American Court has had to explore the meaning and scope of numerous rights and freedoms contained in the American Convention. This re-interpretation of the international treaty, in light of its object and purpose – which focuses on the most comprehensive protection of human rights possible – and imposed by new circumstances, has allowed it to clarify the meaning of the treaty-based principles in an evolutive manner without abandoning the course set by the Convention or changing its fundamental nature. To the contrary, these have been affirmed and enhanced. The reinterpretation of the texts – characteristic of constitutional courts in the national system and of treaty-based courts in the international system – allows the protection of rights to be updated and to respond to innovations resulting from the evolution of relations between the individual and the State.

2. Consequently, the concept maintained by the Inter-American Court, influenced in this matter by European case law, acquires relevance when it affirms that “human rights treaties are living instruments whose interpretation must take into consideration changes over time and current conditions. This evolutive interpretation is consequent with the general rules of interpretation embodied in Article 29 of the American Convention, and also those established in the Vienna Convention on the Law of Treaties.”

3. Obviously, none of this implies that the Court should use its imagination and change the general contents of the Convention, without going through the formal normative instances. In brief, it is not a question of “reforming” the text of the Convention, but of developing the legal decisions taken under the Convention, so that they retain their “capacity of response” to situations the authors of the instrument were not faced with, but that concern issues that are essentially the same as those considered in the Convention and that involve specific problems and require relevant solutions, evidently based on the values, principles and norms in force. Inter-American case law has advanced in this direction, governed by the provisions signed in 1969, in which it has generally been able to find a current and pertinent meaning in order to deal with and resolve the circumstances of each new stage. There are numerous examples of this development.

4. Among the issues examined most frequently by the Inter-American Court is the so-called due process of law, a concept developed by Anglo-American case law and regulations. The Pact of San José does not invoke “due process” literally. However, with other words, it organizes the system of hearing, defense and decision contained in that concept. It fulfills this mission – essential for the protection of human rights – in different ways and with different provisions, including Article 8, which is entitled “Right to a Fair Trial” (Note: “Judicial Guarantees” in Spanish). The purpose of this article is to ensure that the State bodies called on to determine an individual’s rights and obligations – in many aspects – will do so using a procedure that provides the individual with the necessary means to defend his legitimate interests and obtain duly reasoned and justified rulings, so that he is protected by the law and safeguarded from arbitrariness.

5. If the beneficiary of the protection offered by the Convention and the entity that applies the protection adhere to the letter of the text, as it was written several decades

ago, the former's expectation of protection and the latter's possibility of granting it will be limited to the hypothesis of the formal proceedings before the judicial body. Indeed, Article 8 alludes to "judicial" guarantees [Note: the title of the article in Spanish], and then refers to a "tribunal [or judge]." However, this limited scope would be totally insufficient nowadays to achieve the goals that the international system for the protection of human rights has set itself. If the guarantees established in Article 8, which governs the most relevant issues of procedural protection, are limited to the actions of the judicial body, the definition of rights and freedoms by mechanisms that are formally different from the judicial mechanism, but essentially close to the latter to the extent that they serve the same end – to define rights and establish obligations – would not be protected.

6. For example, in several countries the solution of disputes between the Public Administration and the citizen is entrusted to the judicial body: in others, to jurisdictional or administrative body located outside the Judiciary. In some States, once certain information *de facto* and *de jure* has been established, the investigation of offenses and the decision on whether there is criminal liability is entrusted to an administrative authority, the Attorney General's Office (*el Ministerio Público*) – which is neither judge nor court – while in others, it is entrusted to trial judges, who have this formal and material nature. Some transcendental decisions regarding harm to property, the definition of rights between members of different social sectors, the responsibilities of public servants, and measures of protection for children and adolescents (different from those resulting from the violation of a criminal law) have been entrusted to judicial instances, but others – that involve the denial of rights and the control of obligations – are entrusted to instances of a different nature. Historic and contemporary national experiences allow us to add new and abundant examples.

7. The Inter-American Court's case law concerning due process, judicial protection, procedural guarantees or the preparation and execution of the defense of the individual – all expressions that involve a sole concern – have evolved the content of due process of law in a progressive direction – invariably "*garantista*" [privileging or prioritizing due process and the rights of the individual]. Thus, the Court's case law has established what I have called "procedure's 'current frontier'" (*separate opinion* to *Advisory Opinion OC-16*), which changes as necessary, not at whim or giving rise to uncertainty, to adapt the defense of the individual to emerging requirements.

8. Thus, the Court has established that the right of the foreign detainee to be informed of the consular assistance he can receive – a right that is not asserted before judicial body – is a right within the framework of due process; that the guarantees established for criminal proceedings – embodied in Article 8(2) – are also applicable to administrative proceedings, to the extent that the latter (as the former) involve a manifestation of the punitive powers of the State; that the rights established by law in favor of the accused in the criminal sphere must also be applied at other procedural levels, when applicable, etcetera.

9. All the above – and evidently I realize that they are situations of a different type, but connected by a single guiding principle – reveals a sole purpose of protection that is identified by the objective that the decisions of the authorities defining individual rights and obligations, whatever these may be, should satisfy the minimum conditions of objectivity, rationality and legality.

10. In the Case of Claude Reyes *et al.*, I have maintained that the decision of the administrative body determining which information would be provided to the applicants and which information would not be provided to them constituted an act that defined

rights – in this case, the right to seek and receive specific information, in the terms of Article 13 of the Pact of San José – and, when issuing this decision, specific guarantees established in Article 8 of the Convention were not respected. This failure determined that in addition to infringing Article 13 on freedom of thought and expression, declared unanimously by the members of the Inter-American Court, there was also a violation of Article 8, according to the majority, although not according to two members of the Court, for whose opinion I have the highest esteem. Consequently, owing to the consideration that my colleagues merit – whether we agree or disagree – I wish to state my personal sections of view in a comparison of legitimate and constructive opinions.

11. Obviously, during the administrative stage of their *démarches*, the persons who requested information were not participating in a judicial hearing before a judge or court, but intervened in an administrative procedure before an administrative authority. Nevertheless, I consider that the latter was obliged to act as prescribed by Article 8, in all that was pertinent and applicable, to the extent that his decision would define the right of those requesting the information.

12. The need to respect the requirements of Article 8 does not derive, in my understanding, from the nature of the authority within the State's structure, but from the nature of the function that the latter exercises in the specific case and from the transcendence that this can have in relation to the rights and obligations of the individual who appears before that authority, exercising what he considers is his right and awaiting the justified decision that should be taken on his request.

13. The decision of that administrative authority could be contested before a judicial body – as indeed was attempted – for the latter to take a final decision; and the guarantee established in Article 8(1) of the Convention was clearly applicable to the said judicial body. Nevertheless, it is also true that the existence of a means of controlling legality by resorting to law does not imply that the first step in the exercise of the power of decision on individual rights and obligations is removed from the procedural guarantees in exchange for those that exist when the second step of that exercise is undertaken - when proceedings have been filed before the judicial authorities. Strictly speaking, the guarantees must be respected at all stages, each of which leads, either provisionally or finally, to the determination of the rights. The control that the latter stage ensures to the individual does not justify disregarding these guarantees during the first stage (whatsoever leads to this), in the expectation that they will be respected subsequently.

14. Consequently, I consider that the guarantees established in Article 8, in keeping with their meaning in the Court's current case law, do not apply only to the legal action or proceeding, but to the procedure on which the definition of rights and obligations depends, as I have stated repeatedly. Once again I emphasize that this applicability has the scope permitted by the characteristics of the corresponding procedure in each case. Hence, I refer to the obligation to provide justification and not to each and every one of the obligations established in Article 8, both literally and through the new scope that inter-American case law has established.

Sergio García Ramírez
Judge

Pablo Saavedra Alessandri
Secretary